FAR-29010

Commonwealth of Massachusetts

Supreme Judicial Court

COMMONWEALTH

v.

OSCAR DE LOS SANTOS

APPLICATION FOR FURTHER APPELLATE REVIEW

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REQUEST FOR FURTHER APPELLATE REVIEW

There are few legal principles more fundamental than the rule that testimony requires personal knowledge. The courts below ignored this rule.

Here, on a motion to suppress, two officers purported to testify that Mr. de los Santos received Miranda warnings given by a third officer in Spanish — even though both officers conceded that they did not speak or understand Spanish. In his direct appeal, Mr. de los Santos argued that this testimony could not satisfy the Commonwealth's burden to show that he received proper warnings in Spanish. In the alternative, as to his motion for a new trial, Mr. de los Santos argued that his trial counsel was ineffective in failing to object to the officers' incompetent testimony, and thus failing to hold the Commonwealth to its burden.

The Appeals Court rejected both arguments. Instead, it credited testimony purporting to recount words uttered in Spanish from witnesses who conceded that they did not speak or understand that language. And it did so to hold that a Spanish-speaking defendant received Miranda warnings in the only language that he spoke or understood.

That was error. The witnesses at the motion to suppress could no more testify about what was said to Mr. de los Santos in Spanish than they could recount a conversation overheard in ancient Greek. A mere assumption about what was said in a language that witnesses do not understand cannot meet the

Commonwealth's burden. Pursuant to Mass. R. A. P. 27.1, Mr. de los Santos seeks further appellate review of the Appeals Court's opinion.

PRIOR PROCEEDINGS

Mr. de los Santos was charged with one count of carrying a firearm without a license, G.L. c. 269, § 10(a), one count of carrying a loaded firearm without a license, G.L. c. 269, § 10(n), and one count of disorderly conduct, G.L. c. 272, §53. He pleaded not guilty.

Mr. de los Santos filed a pretrial motion to suppress evidence and statements [Add.48] accompanied by an affidavit [Add. 50] and a memorandum of law. [Add.52] An evidentiary hearing on the motion to suppress was held on September 6, 2017. (Doyle, J.). The motion judge denied the motion to suppress in a written decision. [Add.55]

Mr. de los Santos was tried by a jury on December 11-12, 2018 (Swan, J.). At the close of the evidence, the judge allowed Mr. de los Santos' motion for a required finding on the disorderly conduct charge. The jury returned a verdict of not guilty of possession of a loaded firearm without a license. The jury returned a guilty verdict on possession of a firearm without a license.

On September 30, 2019, Mr. de los Santos filed a late notice of appeal in the Newburyport District Court. On October 29, 2019, the court (Swan, J.) allowed the

defendant's motion to be declared indigent. On November 25, 2019, a single justice of the Appeals Court (Sacks, J.) deemed the notice of appeal timely nunc pro tunc. On March 9, 2020, the appeal was docketed in the Appeals Court.

On June 25, 2020, the Appeals Court allowed the defendant's motion to stay appellate proceedings pending the resolution of a new trial motion. That motion was filed in the District Court on July 27, 2020. [Add.60] It was accompanied by the affidavits of trial counsel [Add.72], post-conviction counsel [Add.62], and the defendant [Add.73], as well as a memorandum of law [Add.65]. On November 16, 2020, the court (Doyle, J.) held a hearing on the motion. The court denied the motion, in a written order, on January 20, 2021. [Add.77] Mr. de los Santos timely appealed.

That appeal was entered in the Appeals Court on April 27, 2021, and thereafter consolidated with the direct appeal. Oral argument was held before a panel of that court (Vuono, Shin, & Singh, JJ.) on February 11, 2022. On August 8, 2022, the panel issued a memorandum opinion affirming the conviction and affirming the denial of the new-trial motion. [Add.23]

On August 22, 2022, Mr. de los Santos moved for reconsideration in the Appeals Court. [Add.37] The motion was denied on August 25, 2022.

STATEMENT OF THE CASE AND FACTS

I. Testimony concerning the purported Spanish-language warning

The basic facts relevant to this appeal are set out in the Appeals Court's opinion, with the exception of certain crucial facts misstated by the panel, as explained below. Mass. R. A. P. 27.1(b)(3).

The Appeals Court's opinion states that "there was no evidence adduced at the hearing [on the motion to suppress] concerning the ability of Officers Noyes and Moody to speak or understand Spanish." [Add.28] This is a significant mischaracterization of the testimony at the hearing.

The sole reason that the officers at the scene summoned a Spanish-speaking officer was that none of the officers then present could speak or understand Spanish.

Officer David Noyes testified as follows:

> *Q:* *Who advised them of their Miranda rights?*
>
> *Noyes:* *At the scene they told me and the other officers that they don't speak good English, so we had an officer from Salisbury come over who spoke Spanish and he advised them of their rights.*
>
> [I:19][1]

[1] The transcript of the motion to suppress hearing is cited as: I[#] (9/6/2017 motion hearing).

Officer Scott Peters confirmed that none of the officers then present (Officers Noyes, Moody, or Peters) could speak or understand Spanish:

Q: *When you advised the defendants of their Miranda rights [in English], did they acknowledge those rights to you?*

Peters: *I don't know how well English they spoke so that's why the other officer was called to respond.*

[I:88]

Officer Peters did not speak Spanish either:

Q: *And when you stated to the defendants their Miranda or gave them a Miranda warning?*

Peters: *I gave them one, sir.*

Q: *Did you give them in Spanish?*

Peters: *I did not because I don't speak Spanish, sir.*

[I:89-90]

Additional testimony confirms that the officers could neither speak nor understand Spanish. Officer Noyes was unable to recount Mr. de los Santos's Spanish-language statements in response to the questioning by the Spanish-speaking officer, Juan Guillermo. Instead, he testified only as to what "[Officer] Guillermo told me" because "Officer Guillermo was interpreting" what Mr. de los Santos said in Spanish. [I:35].[2]

[2] Officer Noyes could not even pronounce the Spanish-speaking officer's name. See [I:19] ("Q: Do you know the officer's name? A: Yes, I can't pronounce it though. Guill- -- Guill - -- I have it in my written report. Guill- -- Guill- -- I can't pronounce it."). Officer Moody also had difficulty. See [I:69] ("Q: Who advised them of those warnings? A: Officer, I can't say his – Guillermo from Salisbury.").

This testimony was set out in Mr. de los Santos's appellate brief. And it was again brought to the Appeals Court's attention in his motion to reconsider, which was summarily denied. [Add.37]

II. The Motion to Suppress

Mr. de los Santos moved to suppress "all evidence and statements" derived from the "unlawful search and seizures" because, among other things, he "did not waive voluntarily any of [his] rights under the U.S. Constitution or the Massachusetts Declaration of Rights." [Add.48]

Mr. de los Santos's affidavit averred that he "did not knowingly and voluntary waive any of his constitutional rights," and that "[a]ny statements attributed to me in the police report were not accurate and truly voluntary." [Add.50] The supporting memorandum explained that Mr. de los Santos was:

> entitled to, but did not receive 'Miranda' warnings before purportedly making the statements. *Miranda v. Arizona*, 384 U.S. 436 (1966). Noticeably absent from the Arrest Report is whether any 'Miranda' warnings were administered in Spanish to the vehicle occupants before questioning ensued. Based on a fair reading of the Arrest Report in this matter, questioning by police took place without warnings.
>
> [Add.52]

The Commonwealth called Officers Noyes, Moody, and Peters as witnesses at the evidentiary hearing on the motion. Officer Juan Guillermo, the Spanish-speaking officer said to have given the Spanish-language warning, did not testify.

III. The Order Denying the Pretrial Motion to Suppress

Judge Doyle denied the motion. As relevant here, the motion judge found "no question" that Mr. de los Santos was in custody during his questioning, triggering the Miranda requirement. [Add.58] He also stated that the Commonwealth "bears the burden to prove beyond a reasonable doubt, that the waiver of Miranda rights is knowing, intelligent, and voluntary." [Add.58] He concluded, however that "the Miranda warnings were conveyed to the defendants in their native language and each made a knowing, voluntary, and intelligent waiver of those rights when each made admissions to the police. There are no facts on the record which suggest anything to the contrary." [Add.58-59]

IV. The Motion for a New Trial

A. The Rule 30 Motion

Mr. de los Santos also raised the Miranda issue via Mass. R. Crim. P. 30(b). He moved for a new trial in an abundance of caution because trial counsel did not specifically identify the defect in the prosecutor's attempt to establish the Commonwealth's burden under Miranda by challenging the competency, credibility, and reliability of the non-Spanish-speaking officers' testimony about the purported Spanish-language warning. As a result, Mr. de los Santos argued that trial counsel was ineffective in failing to hold the Commonwealth to its burden to establish that the statement was preceded by a Miranda warning—not

to mention a complete and accurate one—in the only language that Mr. de los Santos understood.[3]

B. The Order Denying the Rule 30 Motion

Judge Doyle denied the motion. The memorandum of decision held as follows:

1. **Trial counsel did not effectively raise the Spanish-language issue.** In the court's view, Mr. de los Santos' pretrial motion was not "specific" enough to alert the court, or the Commonwealth, to the claim that he was not given the warning in Spanish. See [Add.82-83].

2. **Trial counsel's failure was strategic and not unreasonable.** The court went on to conclude that trial counsel's "seeming ineptitude" [Add.83] in failing highlight the absence of any competent evidence that Mr. de los Santos received the Miranda warning in Spanish was strategic, because, in the court's view, trial counsel "chose to pursue a different avenue of attack" in the "extensive cross-examination of Officer Guillermo at trial." [Add.84] It concluded that this "choice" was *not* "manifestly unreasonable." [Add. 84]

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[3]Mr. de los Santos's affidavit explained that he "do[es] not speak or understand English." [Add.73] He also stated that "after I was removed from the vehicle a Spanish-speaking officer arrived. The Spanish-speaking officer never gave me the 'Miranda' warnings.'"[Add.73]

3. **Because the Spanish-speaking officer was called to give the warning, the court assumed that he completed the task.** The court reiterated its previous ruling (in denying the motion to suppress) that "Miranda warnings were given" and "were given in a language that the defendant understood." [Add.84] It clarified the basis for this conclusion. In the court's view, the Commonwealth "met its burden" because "[i]t strains credulity that an officer from a neighboring department would be called in to assist and give Miranda warnings and then somehow fall short." [Add.84]

V. The Appeals Court's Opinion

The Appeals Court affirmed the denial of the motion to suppress and the new-trial motion. With respect to the **direct appeal**:

The panel concluded that "the language issue was waived" because "neither the motion nor the affidavit indicated that a language issue was the basis for seeking suppression." [Add.27]

It went on to address the merits of the argument, and conclude that, in any event, the "the Commonwealth addressed [the language issue] at the hearing." [Add.27] The panel reasoned that the motion judge was "entitled" to "credit[] the testimony of the officers . . . that the defendant was advised of Miranda rights in his native language." [Add.28] The panel opined that "there was no evidence adduced at the hearing concerning the ability of Officers Noyes and Moody to

speak or understand Spanish." [Add.28], but see §I, supra at pp. 6-7 (quoting testimony on this topic). And it faulted trial counsel's failure to object "to the officers' testimony as to the communication between the Spanish speaking officer and the defendant." [Add.28]

With respect to the **new-trial motion**, the panel concluded that "the defendant failed to establish counsel's deficient performance." [Add.30-31] It did so despite its findings concerning the defects in trial counsel's handling of the "language issue" including it's conclusion that trial counsel had (1) waived the language issue, (2) failed to "adduce" evidence about the ability of the witnesses to speak or understand Spanish, and (3) failed to object to the foundation of testimony about the purported Spanish-language warning. [Add.27-28]

ISSUES PRESENTED

May testimony from a witness who asserts that he overheard a Miranda warning given in a language that he does not speak or understand meet the Commonwealth's burden to establish that the warning was given in that language?

If trial counsel waived the "language issue" by not identifying the deficiencies in the Commonwealth's evidence at the motion to suppress hearing, and not objecting to testimony about a warning given in a language that the

witnesses do not understand, did that waiver constitute ineffective assistance of counsel?

Argument

The substantive issue in this case is straightforward. Because the officers testifying at the motion to suppress did not speak or understand Spanish, the motion judge's reliance on their testimony to find that Mr. de los Santos received the warning in the only language that he understood—and then made a knowing, voluntary, and intelligent waiver beyond a reasonable doubt—was not supported by the evidence. The conclusion that the Commonwealth met the Miranda prerequisite was clear error. Reliance on a mere assumption that the officer *must have* given the warning in Spanish is untenable.

The preliminary question is whether the pretrial motion preserved the error for direct review, or whether trial counsel's failure to identify and challenge the precise defect in the Commonwealth's evidence waived the issue and required a Rule 30 motion. In Mr. de los Santos's view, the better reading of the law—especially in light of the motion judge's express finding on this very issue—is that the issue is ripe for direct review. See § I. But even if trial counsel's "waiver" of the "language issue" allowed the motion judge to credit the testimony of non-Spanish-speaking witnesses (as the Appeals Court held) then that performance was constitutionally ineffective, and not reasonably strategic. See § II.

I. Testimony from witnesses who do not speak or understand Spanish cannot meet the Commonwealth's burden to establish that a Spanish-language Miranda warning was given.

A. The Commonwealth's own witnesses provided ample evidence that they did not speak of understand Spanish.

There was no dispute that Mr. de los Santos did not speak English, and therefore that the Miranda warning had to be accurately conveyed to him in Spanish. *Commonwealth v. Vasquez*, 482 Mass. 850, 864 (2019).

The Appeals Court concluded that the prosecutor "addressed [the language issue] at the hearing" so as to "entitle[]" the motion judge to find that Mr. de los Santos "was advised of Miranda rights in his native language and made a knowing, voluntary, and intelligent wavier of those rights." [Add.27-28] That was error. As explained above, the testifying officers summoned Officer Guillermo to the scene because they could not themselves provide the constitutionally-required Miranda warning in Spanish. The Appeals Court's opinion mischaracterizes the record and overlooks ample and detailed testimony from the Commonwealth's own witnesses, summarized supra at pp. 6-7 (quoting I:19, I:35, I:88), concerning their *inability* to speak or understand Spanish at the motion to suppress hearing.

Contrary to the panel's recitation of the facts, there was ample evidence "adduced" [Add.28] at the hearing that Officers Noyes and Moody did not speak or understand Spanish. The panel's contrary conclusion is a significant factual

error that fatally undermines the opinion's analysis on a condition necessary to "entitle[]" the motion judge "to credit the testimony of the officers" about what was said in a language they did not understand. [Add.28]

Consequently, the conclusion that the warning was given in Spanish is not supported by any competent evidence. That factual error infected all of the of Appeals Court's analysis, and it generated other legal errors, as well.[4]

B. Competent testimony requires comprehension.

"Lay witnesses may only testify regarding matters within their personal knowledge." *Commonwealth v. Moffat,* 486 Mass. 193, 200 (2020). In the present context, the reason is simple: in the absence of personal knowledge, testimony is not reliable to meet the Commonwealth's burden to prove a knowing, willing, and intelligent waiver of rights, and to do so "beyond a reasonable doubt." *Commonwealth v. Hoyt*, 461 Mass. 143, 152 (2011). Personal knowledge requires comprehension. H.P. Carroll & W.C. Flanagan, Mass. Trial Practice § 13:61 (3d. 2017). And obviously, a witness cannot comprehend the meaning of words in a language that she does not understand. C. Wright & A. Miller, 27 Fed. Prac. & Proc. Evid. § 6023. For all that the testifying officers knew—and indeed, as Mr. de los

[4] The defendant alerted the Appeals Court to this factual error in his motion for reconsideration under Mass. R. A. P. 27. [Add.37] That motion was denied.

Santos argued—"questioning by police took place without warnings" "administered in Spanish." [Add.52, Add.73] The testimony to the contrary was based on an assumption about the meaning of words in a language the witnesses did not speak or understand. There was no proper basis to credit the testimony on that issue.

The Appeals Court's misapplication of *Commonwealth v. Perez*, 411 Mass. 249, 256 (1991) is emblematic of this approach. See [Add.29]. *Perez* explained that the fact that the testifying officer "does not understand Spanish . . . is of no consequence in view of the ample additional evidence which warranted findings that the defendant had received and understood his Miranda warnings." *Id.* 256. The "ample additional evidence" in *Perez* included the facts that the defendant was twice "given a card containing the Miranda warning in Spanish [. . .] read the card, said that he understood the warnings, and signed the card" before questioning. *Id.* at 255. Here, by contrast, testimony from the non-Spanish-speaking officers was the only basis for the finding that the warning was given in Spanish. The panel's opinion does mention any of these critical differences.

C. The burden does not shift to the defendant.

The Commonwealth's burden to "prove affirmatively" the Miranda prerequisite required—at the threshold—competent evidence that Mr. de los Santos was advised of his rights in Spanish. *Commonwealth v. Adams*, 389 Mass.

265, 270 (1983).[5] Apart from ignoring specific testimony about the witnesses' *inability* to understand Spanish, see supra pp. 6-7 and 14-15, Appeals Court justified its holding on the basis that trial counsel failed to object to the unreliable testimony. [Add.28] The former is a misreading of the testimony, and the latter is a misapprehension of law. The Commonwealth's "heavy burden" to establish a valid warning does not shift to the defendant. *Miranda v. Arizona*, 384 Mass. 436, 478 (1996). A failure to object to the foundation of testimony of officers who, by their own admission, do not understand Spanish cannot insulate a determination made in reliance on that testimony from appellate review.[6]

D. Proof-by-assumption is untenable.

The motion judge candidly justified the denial of the motion to suppress on his view that "[i]t strains credulity that an officer from a neighboring department would be called in to assist and give Miranda warnings and then somehow fall short in completing the one task he was asked to perform." [Add.84] This is mere guesswork but, surprisingly, the Appeals Court endorsed this approach. [Add.31] Reliance on the assumption that the Spanish-speaking officer did not "somehow

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[5] The motion judge correctly recognized that the only relevant warnings were those purportedly given in Mr. de los Santos's "native language." [Add.58-59] See *Commonwealth v. Vuthy Seng*, 436 Mass. 537, 544 (2002).

[6] If the failure to object has the effect that the Appeals Court gave it, then it constituted ineffective assistance, because it deprived the defendant of a substantial ground of defense.

fall short" [Add.84] reflects a recognition that the non-Spanish-speaking witnesses' testimony about what transpired in Spanish could not meet the Commonwealth's burden. But assumptions are not a substitute for evidence. This proof-by-assumption approach is flatly inconsistent with the Commonwealth's burden to establish a knowing, voluntary, and intelligent waiver beyond a reasonable doubt. This Court should make clear that such assumptions cannot meet the prosecution's burden to establish that Miranda warnings are given.

E. The "language issue" is cognizable on direct review.

The threshold issue in this appeal is whether the Mr. de los Santos received the required Spanish-language warnings at all. Although both courts below addressed the merits of this issue, they also opined that the issue had been waived. That is incorrect.[7]

This Court has explained that "the degree of detail required" by Rule 13 "must be evaluated in light of its practical purposes." *Commonwealth v. Mubdi*, 456 Mass. 385, 390 (2010). *Mubdi* put the burden on the prosecutor to clarify ambiguities in a motion to suppress, *id.* at 391, and rejected a Rule 1:28 Order that relied on the waiver argument that the Appeals Court here embraces. *Id.* at 386. Moreover, any ambiguity here was dispelled by Mr. de los Santos's memorandum

[7] If the "language issue" was waived by trial counsel, such waiver constituted ineffective assistance.

of law, which *unambiguously* explained that the warning was not given in Spanish. [Add.52]. Finally, as the Appeals Court correctly noted, "[r]egardless of the lack of notice given as to the language issue . . . the Commonwealth addressed it at the hearing." [Add.27]. And, of course, the motion judge made specific (albeit erroneous) findings that Mr. de los Santos received the Miranda warning "in his native language." [Add.58-59]

Plainly, then, the issue was presented below and is cognizable on direct review. The fact that the Commonwealth's witnesses were not competent to establish a valid Miranda warning was a failure of evidence, not a waiver of Mr. de los Santos's constitutional rights.

II. If trial counsel's deficiencies permitted reliance on testimony of witnesses who did not understand Spanish, trial counsel was constitutionally ineffective.

If, as the Appeals Court held, trial counsel's purported failures—to specifically raise "the language issue," to adduce (additional) evidence concerning the witnesses' inability to speak Spanish, and to object to testimony about what was said in a language they did not understand—allowed the motion judge to credit the testimony of non-Spanish speaking officers, those deficiencies "deprived the defendant of an otherwise available, substantial ground of defense." *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). The Appeals Court nevertheless affirmed the district court's denial of the Rule 30 motion because in its view, "the

defendant failed to establish counsel's deficient performance." [Add.31] This ruling is internally inconsistent and untenable on its own terms. And its heads-I-win-tales-you-loose approach threatens to insulate the Commonwealth's failure to establish the Miranda prerequisite from any review. This Court should allow further appellate review to ensure that fundamental constitutional rights are not so easily disregarded.

The new-trial motion judge's conclusion that trial counsel's deficiencies at the motion to suppress were the product of a strategic and reasonable choice is difficult to understand. [Add.84] If trial counsel purposefully declined to challenge the Commonwealth's failure to prove that the warning was given in Spanish, then this "strategy" was "manifestly unreasonable." *Commonwealth v. Acevedo*, 446 Mass. 435, 442 (2006). There was no plausible advantage to intentionally acquiescing to the admission of the unwarned statement. And the premise of the motion judge's ruling was wrong: [Add.84] there was no need to trade the suppression remedy (which would have suppressed the statement) for the admission of the statement with the humane practice instruction (which merely instructed the jury to consider its voluntariness at trial).

CONCLUSION

For the foregoing reasons, this Court should grant this application for further appellate review.

Respectfully submitted,

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September 9, 2022

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-363

COMMONWEALTH

vs.

OSCAR DELOSSANTOS.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the district court, the defendant was convicted of carrying a firearm without a license.[2] See G. L. c. 269, § 10 (a). He moved for a new trial on the ground of ineffective assistance of counsel in connection with a motion to suppress evidence that was denied prior to trial. The motion for new trial was heard, not by the trial judge, but by the judge who had heard the pretrial motion to suppress (motion judge). On appeal, the defendant contends that the motion judge erred in denying his motion to suppress evidence and his motion

[1] As is our custom, we set forth the defendant's name as it appears in the criminal complaint.

[2] The defendant was also charged with one count of carrying a loaded firearm without a license and one count of disorderly conduct. The trial judge allowed the defendant's motion for a required finding of not guilty on the disorderly conduct charge. The defendant was acquitted of carrying a loaded firearm without a license.

for new trial. Although we take issue with the motion judge, rather than the available trial judge, hearing the motion for new trial, we affirm the defendant's conviction and the order denying his motion for new trial.

Facts at the suppression hearing.[3] At approximately 10:15 P.M. on January 19, 2017, Amesbury police officer David Noyes observed a gray Honda motor vehicle with two male occupants who "looked at [him] wide-eyed," rolled through a stop sign, and made a "quick right and accelerated" without signaling. The officer noticed that the Honda's license plate was hanging and was secured by a single screw. The officer called dispatch to conduct a registry query of the vehicle. Shortly thereafter, Amesbury police officer Neil Moody, who was nearby and heard the dispatch request, observed the same vehicle. Upon learning that the Honda's registered owner did not have a valid license, Officer Moody pulled up directly behind it as it was stopped at a red light; when the light turned green, the officer activated his signal lights to initiate a traffic stop. The Honda, which had been signaling a left turn, continued straight through the green light and did not stop at available locations it passed, instead turning left

[3] The facts are taken from the motion judge's findings, supplemented by evidence presented at the hearing on the motion to suppress, which does not detract from those findings. See Commonwealth v. Garner, 490 Mass. 90, 93-94 (2022).

into the parking lot of a convenience store and parking in front of a building, "slightly askew . . . taking up two [parking] spaces." Officer Moody pulled in behind the Honda and Officer Noyes pulled in behind him.

Before the officers were able to approach the Honda, both the driver and passenger (later identified as the defendant) "jumped out" of the vehicle and, leaving the doors open, began walking quickly in opposite directions. Both officers got out of their police cars and yelled at the defendant and the driver to stop and get back into their car. The defendant was eight to ten feet away from the vehicle when Officer Moody drew his taser and pointed it at the defendant, ordering him "multiple times" to get back into the vehicle. After several orders from the officers, the defendant and the driver returned to the vehicle and were ordered to put their hands on the vehicle's dashboard. Although they initially complied, both the defendant and the driver took their hands off the dashboard. After the defendant bent down at the waist, Officer Noyes asked Officer Moody to remove the defendant from the vehicle, due to safety concerns. Once the defendant was removed, Officer Noyes went to remove the driver, who then lunged towards the center console. After both the defendant and the driver were secured, an officer searched the front passenger compartment and located a loaded handgun.

The defendant and the driver were placed under arrest. When they told the officers that they did not speak English well, a Spanish speaking officer from another police department was called to the scene; after that officer administered Miranda warnings in Spanish, the defendant and the driver appeared to understand.[4] Subsequently, the driver admitted that the firearm was his, and that he had purchased it on the street in Lawrence. The defendant stated that he had been trying to hide the firearm.

Discussion. 1. Motion to suppress. On direct appeal, the defendant contends that, because the Commonwealth failed to establish that the defendant "receive[d] the Miranda warnings" in the "only language that [the defendant] speaks and understands," his statements should have been suppressed. He argues that the motion judge erroneously relied on testimony from officers who "did not speak or understand Spanish" to conclude that such warnings were properly given. In our review of a ruling on a motion to suppress, "[w]e accept the findings of the motion judge absent clear error, but determine independently 'the correctness of the judge's application of constitutional principles to the facts as found'" (citation

[4] Despite the language issue, the police were able to communicate basic commands with which the defendant and the driver complied, for example, to put their hands on their heads or the steering wheel and to get back into the car.

omitted). Commonwealth v. Santiago, 470 Mass. 574, 578-579 (2015).

As a preliminary matter, we note that the defendant's motion to suppress did not allege that Spanish was the only language that he spoke and understood. The motion alleged generally that the defendant did not waive voluntarily his rights under the U.S. Constitution and Massachusetts Declaration of Rights. The defendant's supporting affidavit likewise indicated generally that he did not knowingly and voluntarily waive any constitutional rights and that any statements attributed to him "were not accurate and not truly voluntary." Neither the motion nor the affidavit indicated that a language issue was the basis for seeking suppression. To the contrary, the factual predicate for the defendant's motion was that he was "intimidated by the number of law enforcement officers converging on the scene," and that he was "intimidated by the demeanor and aggressiveness of the officers at the scene." Under the circumstances, the language issue was waived.

Regardless of the lack of notice given as to the language issue, however, the Commonwealth addressed it at the hearing. Officers Noyes and Moody testified that, once they understood that there was a language issue, they secured the assistance of a Spanish speaking officer. The officers also testified that the Spanish speaking officer read the defendant his Miranda

rights in Spanish, after which, the defendant appeared to understand and then made statements to the police. The motion judge credited the testimony of the officers and determined that the defendant was advised of Miranda rights in his native language and made a knowing, voluntary, and intelligent waiver of those rights. This he was entitled to do. See Commonwealth v. Sinforoso, 434 Mass. 320, 321 (2001) (in hearing on motion to suppress, "determination of the weight and credibility of the testimony is the function and responsibility of the judge who saw the witnesses").

The defendant nevertheless contends that the police did not speak or understand Spanish and therefore had no basis on which to testify what was communicated between the Spanish speaking officer and the defendant. Yet, there was no evidence adduced at the hearing concerning the ability of Officers Noyes and Moody to speak or understand Spanish. Moreover, the defendant did not object to the officers' testimony on the basis that they lacked a foundation to testify as to the communication between the Spanish speaking officer and the defendant.

Additionally, the defendant never contended that there was any defect with the Miranda warnings as given. Rather, the defendant's claim (made explicit only post-hearing) was that they were not given at all. Under the circumstances, the record was sufficient for the motion judge to conclude that the

defendant was properly advised of his Miranda warnings. See Commonwealth v. Perez, 411 Mass. 249, 256 (1991) (rejecting argument that non-Spanish speaking officer's testimony that Spanish speaking officer administered Miranda warnings was insufficient to show that proper warnings were administered).

2. Motion for new trial. The defendant moved for a new trial on the basis of ineffective assistance of counsel premised on two grounds, both related to the motion to suppress evidence. On appeal, we consider whether the motion judge committed a significant error of law or abuse of discretion in denying the defendant's motion for new trial. Commonwealth v. Sanchez, 485 Mass. 491, 498 (2020). Motions for new trial are committed to "the sound discretion of the judge," Commonwealth v. Moore, 408 Mass. 117, 125 (1990), and "are granted only in extraordinary circumstances." Commonwealth v. Comita, 441 Mass. 86, 93 (2004). "A judge may make the ruling based solely on the affidavits," Commonwealth v. Scott, 467 Mass 336, 344 (2014), and "the burden is on the defendant to prove facts that are 'neither agreed upon nor apparent on the face of the record'" (citation omitted). Comita, supra.

Where, as here, the motion is based on ineffective assistance of counsel, the defendant must show that there has been a "serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that

which might be expected from an ordinary fallible lawyer," and that counsel's performance "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "A strategic or tactical decision by counsel will not be considered ineffective assistance unless that decision was 'manifestly unreasonable' when made" (citation omitted). Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006). When the claim involves counsel's performance with respect to a motion to suppress, "the defendant must demonstrate that the evidence would have been suppressed if properly challenged." Commonwealth v. Cavitt, 460 Mass. 617, 626 (2011).

a. Miranda warnings. The defendant argues that trial counsel performed deficiently by failing to "hold the Commonwealth to its burden to prove that [the defendant] received accurate and complete Spanish-language Miranda warnings." As the motion judge noted, however, the affidavits in support of the motion for new trial failed to raise an issue with respect to the adequacy of the warnings. In his own affidavit, the defendant acknowledged that "a Spanish speaking officer arrived" at the scene but contended that the officer did not tell him any of the things that constitute Miranda warnings.[5]

[5] In a post-hearing memorandum of law, the defendant argued that he "did not receive Miranda warnings" and, as support, drew the

Therefore, the defendant failed to establish counsel's deficient performance and the motion judge properly denied the defendant's motion on this ground.

b. Disproportionate force. The defendant also argues that trial counsel was ineffective for failing to argue that the use of disproportionate force during the encounter required suppression of the defendant's statements. The defendant contends that his trial counsel should have argued that, when Officer Moody "painted" him with the red laser light of a taser, the defendant was effectively under arrest but the police did not have probable cause to believe that he had committed any crime at that time. Relying on cases involving the threat of lethal force (i.e., pointing a gun), the defendant argues that a disproportionate force argument would have succeeded in suppressing evidence leading to dismissal of the case. As noted by the motion judge, however, the defendant's theory was a novel one, as evidenced by the lack of any case law involving a disproportionate force argument in the context of a taser. See

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court's attention to the fact that the arrest report did not mention the defendant receiving Miranda warnings in Spanish. The argument appears to be aimed at persuading the judge to discredit the testimony of Officers Noyes and Moody that the defendant was advised of Miranda rights in Spanish. The judge, however, found it improbable that a Spanish speaking officer would be called to the scene for the specific purpose of administering Miranda warnings and then fail in that single task.

Commonwealth v. McLaughlin, 79 Mass. App. Ct. 670, 678 n.5 (2011) ("omission of novel theory does not typically constitute performance below the level of the ordinary fallible lawyer"). The judge further concluded, and we agree, that this was not a routine traffic stop and that the officers could have perceived the defendant as a threat. As the defendant failed to demonstrate counsel's deficient performance, the judge properly denied the motion for new trial on this ground as well.

3. Judge hearing motion for new trial. The parties appeared for hearing on the defendant's motion for new trial before the judge who had heard the pretrial motion to suppress evidence. The motion judge explained to the parties that the trial judge had referred the case to him because the motion for new trial concerned the motion to suppress that had been handled by him. Although the prosecutor alerted the judge to specific recent case law indicating that the motion should be heard by the trial judge, the motion judge asked the defendant whether he had any objection to his hearing the motion or, alternatively, whether he preferred to have the trial judge hear the motion for new trial. The defendant indicated no objection to proceeding before the motion judge and, at the prosecutor's insistence, the

motion judge placed the defendant under oath and had him waive any issue on appeal regarding the election.[6]

The trial judge should have heard and decided the motion for new trial. Motions for new trial are governed by Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), which provides that the "trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." The rule specifically authorizes the trial judge, not any judge, to rule on a motion for new trial, because the trial judge, having presided over the trial, is in the best position to determine whether justice may not have been done. See In re McCastle, 401 Mass. 105, 106 (1987).

Even where a pretrial motion to suppress is at issue in a postconviction motion for new trial, the judge who heard the pretrial motion is not in any better position than the trial judge. Although the motion judge may be well placed to evaluate defense counsel's performance in connection with the suppression motion, a motion for new trial requires a further assessment of the strength of the Commonwealth's case and the impact at trial

[6] Having assented to this procedure, the defendant has not raised any challenge to the motion judge hearing the new trial motion. Additionally, because our own review of the record leads us to conclude that the motion was properly denied, we need not vacate the order and remand the new trial motion so that the trial judge can decide it.

of the evidence at issue in the motion to suppress. This requires the vantage point of the trial judge.

As the Supreme Judicial Court observed in Commonwealth v. Richards, 485 Mass. 896, 911 (2020): "If a claim of ineffective assistance of counsel necessarily includes an evaluation of the likelihood that a motion to suppress would have been allowed if the defendant had received effective trial counsel, the trial judge would not refer the matter to the judge who had heard the motion to suppress for his or her analysis; nor, if the claim involves an analysis of whether the jury's verdict would have been different, would the trial judge reconvene the jury. Instead, in deciding a motion for a new trial, a trial judge conducts his or her own evaluation of the likelihood of success."

Furthermore, the parties should not have been given an option to choose the judge who would hear the motion where the rules of criminal procedure and case law clearly established that the issue was for the trial judge. The rule avoids an occurrence where parties are asked to select which judge they want to hear the motion, and the "undesirable problem of judge shopping" (citation omitted). Demoulas v. Demoulas, 432 Mass. 43, 53 (2000). See Commonwealth v. Gebo, 489 Mass. 757, 768-769 (2022) ("'Judge shopping' refers to a litigant's attempt to steer a case toward or away from a particular judge, generally

out of some belief that the judge's idiosyncrasies would make it more or less beneficial to the litigant that that particular judge preside over the litigation," which is, "inherently unfair to other litigants, undermines public confidence in the judiciary, and properly has earned the condemnation of courts across the country").

We therefore once again reiterate that a motion for new trial is properly heard by the trial judge and assigned to another only when the trial judge is unable to hear the motion. See, e.g., Richards, 485 Mass. at 904 (because trial judge had retired, another judge was assigned case).

Judgment affirmed.

Order denying motion for new trial affirmed.

By the Court (Vuono, Shin & Singh, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: August 8, 2022.

[7] The panelists are listed in order of seniority.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 21-P-363

COMMONWEALTH

vs.

OSCAR DELOSSANTOS.

Pending in the Newburyport District Court for the County of Essex

Ordered, that the following entry be made on the docket:

Judgment affirmed.

Order denying motion for new trial affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date August 8, 2022.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. APPEALS COURT
2021-P-0363

COMMONWEALTH

v.

OSCAR DE LOS SANTOS

MOTION TO RECONSIDER

Pursuant to Mass. R. A. P. 27, Mr. de los Santos moves for reconsideration of the memorandum decision in his consolidated appeal, decided on August 8, 2022 by a panel of this Court (Vuono, Shin & Singh, JJ.). As explained below, the memorandum overlooked or misapprehended four critical points of law and fact.

1. The Commonwealth's witnesses provided ample evidence that Officers Noyes and Moody did not speak or understand Spanish.

The memorandum states that "there was no evidence adduced at the hearing concerning the ability of Officers Noyes and Moody to speak or understand Spanish." Mem. Op. 6. This is a significant factual error that overlooks ample testimony on this specific topic.

The sole reason that the officers summoned a Spanish-speaking officer was that they could not speak Spanish. Officer David Noyes testified as follows:

Q: Who advised them of their Miranda rights?

Noyes: At the scene they told me and the other officers that they don't speak good English, so we had an officer from Salisbury come over who spoke Spanish and he advised them of their rights.

[I:19][1]

Officer Scott Peters confirmed that none of the officers then present could speak or understand Spanish:

> Q: When you advised the defendants of their Miranda rights [in English], did they acknowledge those rights to you?
>
> Peters: I don't know how well English they spoke so that's why the other officer was called to respond.
> [I:88]

Thus, the Commonwealth's own witnesses affirmatively testified that none of the officers then at the scene (Noyes, Moody, and Peters) could speak Spanish.[2] In these circumstances, Noyes and Moody could no more testify as to what was said in Spanish than they could about a conversation in Turkish or Ukrainian.

Additional testimony confirms that the officers could neither speak nor understand Spanish. Officer Noyes was unable to recount Mr. de los Santos's Spanish-language statements. Instead, he testified only as to what "[Officer] Guillermo told me" because "Officer Guillermo was interpreting" what Mr. de los

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[1] Officer Noyes could not pronounce the Spanish-speaking officer's name. See [I:19] ("Q: Do you know the officer's name? A: Yes, I can't pronounce it though. Guill- -- Guill - -- I have it in my written report. Guill- -- Guill- -- I can't pronounce it."). Officer Moody also had difficulty. See [I:69] ("Q: Who advised them of those warnings? A: Officer, I can't say his – Guillermo from Salisbury.").

[2] Although there is no direct testimony from Officer Moody concerning his ability to speak or understand Spanish, uncontradicted testimony from Officers Noyes and Peters establishes that none of the officers then present, including Moody, spoke or understood Spanish.

Santos said in Spanish. [I:35]. If Officer Noyes could not understand what Mr. de los Santos said in Spanish, no reasonable inference can be drawn that he could understand what Officer Guillermo said in Spanish.[3]

In short, there was ample evidence that Noyes and Moody did not speak or understand Spanish. The memorandum's contrary conclusion is a significant factual error. It undermines the panel's analysis on a condition necessary to "entitle[]" the judge to "credit[] the testimony of the officers" about what was said in Spanish. Mem. Op. 6. [4]

2. The memorandum misallocates the burden of establishing that the warning was given in the only language that Mr. de los Santos understands.

The memorandum concludes that the "Commonwealth addressed [the language issue] at the hearing," so as to "entitle[]" the motion judge to find that Mr. de los Santos "was advised of Miranda rights in his native language and made a knowing, voluntary, and intelligent waiver of those rights." Mem. Op. 5-6. As explained above, that conclusion overlooks ample and detailed testimony from

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[3] The memorandum properly does not rely on receptive bilingualism theory—that is, an assumption that the officers understood Spanish, although they did not speak it. That theory finds no support in the record.

[4] The memorandum also misstates the holding of *Commonwealth v. Perez*, 411 Mass. 249 (1991). See Mem. Op. at 7. *Perez* held that the fact that the testifying officer "does not understand Spanish . . . is of no consequence in view of the ample additional evidence which warranted findings that the defendant had received and understood his Miranda warnings." *Id.* at 256. Here, by contrast, testimony from officers who "do[] not understand Spanish" was the sole basis for the finding that the warning was given in Spanish.

the Commonwealth's witnesses concerning their *inability* to speak or understand Spanish.

But that misapprehension of fact does not stand alone. The memorandum's analysis also rests on a misallocation of the burden to establish a voluntary, knowing, and intelligent waiver of Miranda rights beyond a reasonable doubt. *Commonwealth v. Hoyt,* 461 Mass. 143, 152 (2011). See *Commonwealth v. Clarke*, 461 Mass. 3336, 342 (2012) ("unless the government can prove voluntary, knowing, and intelligent waiver . . . any statements made . . . are inadmissible"). The memorandum recited this legal standard, but failed to apply it. See Mem. Op. 6.

The Commonwealth's burden to "prove affirmatively" the Miranda prerequisite required—at the outset—competent evidence that Mr. de los Santos was advised of his rights in Spanish. *Commonwealth v. Adams*, 389 Mass. 265, 270 (1983). The memorandum's analysis turned this standard on its head, and instead saddled the defendant with the burden of proving that the officers did not speak or understand Spanish. That is a misapprehension of the law. The Commonwealth has the "heavy burden" to establish a valid warning. *Miranda v. Arizona*, 384 U.S. 436, 478 (1996). The burden never shifts to the defendant.

The memorandum also justifies reliance on clearly incompetent testimony on the basis that trial counsel failed to object. Mem. Op. 6. But this defect, by trial counsel, does not waive the Commonwealth's burden to establish that the

warning was given. Nor does it insulate a determination made in reliance on incompetent and unreliable evidence from appellate review. Cf. *Commonwealth v. Lewin*, 408 Mass. 147, 159 (1990) ("Commonwealth cannot avoid a motion to suppress simply by showing that the police cannot establish where, when, or how the evidence was seized"). Personal knowledge requires comprehension. Whether a Spanish-language warning was given at all was an essential element that the Commonwealth had to prove beyond a reasonable doubt. Since there was ample affirmative testimony concerning the witnesses' *inability* to understand Spanish, the motion judge's findings in reliance on their testimony were clearly erroneous. Where the Commonwealth bears the burden of proof, these findings are cognizable on appeal, regardless of the absence of objection.

3. The memorandum's endorsement of proof-by-assumption to establish that the warning was given in Spanish is untenable.

In a footnote, the memorandum appears to endorse an alternative basis (other than the testimony of Moody and Noyes) for the conclusion that Mr. de los Santos received Spanish-language warnings. The memorandum observes that the motion judge "found it improbable that a Spanish speaking officer would be called to the scene for a specific purpose of administering the Miranda warning and then fail in that single task." Mem. Op. 9 n.5. This is an accurate paraphrase of the motion judge's explanation for his "previous findings." [RA146] See [RA146] ("It strains credulity that an officer from a neighboring department would be

called in to assist and give Miranda warnings and then somehow fall short in completing the one task he was asked to perform").[5]

But assumptions are not a substitute for evidence. This proof-by-supposition approach is simply wrong. It is flatly inconsistent with the Commonwealth's burden to establish a knowing, voluntary, and intelligent waiver, and to do so "beyond a reasonable doubt." *Hoyt*, 461 Mass. at 152. Indeed, the motion judge's reliance on the assumption that the Spanish-speaking officer did not "somehow fall short" reflects a recognition that Moody's and Noyes's testimony about what was said in Spanish could not meet the Commonwealth's burden. Affirmance on the basis of this assumption misapprehends the law.

For the reasons set out in §§ 1-3, Mr. de los Santos respectfully requests that the panel reconsider its decision as to his direct appeal.

For the following reasons, he also requests reconsideration as to his appeal from the denial of his motion for a new trial.

4. If trial counsel's deficiencies allowed reliance on Moody's and Noyes's testimony to establish the Spanish-language warning, trial counsel was constitutionally ineffective.

The memorandum affirmed the denial of the motion to suppress because, in the panel's view, trial counsel (1) failed to adduce (additional) evidence

[5] Although this analysis appears in the Memorandum of Decision denying the Rule 30 motion, it is a summary and restatement of the denial of the motion to suppress. See [RA146] (summarizing the court's "previously made findings").

concerning the inability of the Commonwealth's witnesses to speak or understand Spanish, and (2) failed to object to testimony from non-Spanish speakers about words uttered in Spanish. Mem. Op. 6. This analysis mirrors Mr. de los Santos's Rule 30 motion, which was premised on trial counsel's constitutionally ineffective "failure to file a viable motion to suppress [which should have addressed] the Commonwealth's failure to meet its burden to establish the substance of the Miranda warnings allegedly given to Mr. de los Santos, by testimony or evidence." [RA58] Most significantly, as Mr. de los Santos's affidavit asserts, he was never given the constitutionally-required warning in the only language that he understands. [RA87-88][6]

The memorandum nevertheless concludes, without analysis, that Mr. de los Santos "failed to establish counsel's deficient performance and the motion judge properly denied the defendant's [new-trial] motion on this ground." Mem. Op. at 9. This conclusion flies in the face of the memorandum's recitation, three pages earlier, of the very defaults which allowed the motion judge to credit Moody's and Noyes's testimony about words uttered in Spanish. Mem. Op. 6.[7]

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[6] The memorandum does not rely on the "lack of notice given as to the language issue." Mem. Op. 5. If this factored into the analysis, the failure constitutes ineffective assistance.

[7] To the extent that the affirmance of the denial of the new-trial motion is predicated on the motion judge's assumption that it was "improbable" that the warning was not given in Spanish, see Mem. Op. 9 n.5, that analysis

This heads-I-win, tales-you-loose approach reflects a misapprehension of law and fact, and overlooks the panel's own holdings concerning the defects in Mr. de los Santos's direct appeal. If (as the memorandum holds) trial counsel's twin failures to adduce (additional) evidence concerning the officers' inability to comprehend Spanish, and to object to testimony about what was said in a language they did not understand, allowed the judge to credit the testimony of non-Spanish speaking officers, see Mem. Op. 6, those deficiencies "deprived the defendant of an otherwise available, substantial ground of defense." *Commonwealth v. Saferian*, 336 Mass. 89, 96 (1974).

Because the memorandum's contrary conclusion is internally inconsistent and untenable on its own terms, Mr. de los Santos respectfully requests that the Court reconsider its decision as to his motion for a new trial, as well as his direct appeal.

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misapprehends the requirement that evidence (not assumptions) meet the Commonwealth's burden, see § 3, and for that reason should be reconsidered.

Respectfully submitted,

/s/ Matthew Spurlock
Matthew Spurlock

ATTORNEY FOR
OSCAR DE LOS SANTOS

COMMITTEE FOR PUBLIC COUNSEL SERVICES
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August 22, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the rules of the court that pertain to the filing of motions for reconsideration specified in Rule 27(b) of the Massachusetts Rules of Appellate Procedure. This brief complies with the type-volume limitation of Rules 27(b) and 20(a)(4)(B) because it contains 1,852 words, excluding the parts of the brief exempted by the rule. This brief complies with the type-style requirements of Rule 20 because it has been prepared in proportionally-spaced typeface using Microsoft Word in 14 point Altheas font.

/s/ Matthew Spurlock
Matthew Spurlock

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August 22, 2022

CERTIFICATE OF SERVICE

I certify that I have today made service on the Commonwealth by directing a copy of this motion via electronic service to:

Catherine Semel
Essex County District Attorney's Office
Ten Federal Street
Salem, MA 01970

/s/ Matthew Spurlock
Matthew Spurlock

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August 22, 2022

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
DISTRICT COURT DEPARTMENT

ESSEX, SS. NEWBURYPORT DISTRICT
DOCKET NO. 17-819

COMMONWEALTH)
)
VS.)
)
OSCAR DELOSANTOS)
Defendant)

MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

The defendant moves, pursuant to Mass.R.Crim.P. 13, the 4th and 14th Amendments to the United States Constitution, and Article 14 of the Massachusetts Declaration of Rights, to suppress all evidence and statements seized on May 13, 20014 based on the unlawful search and seizures conducted on that date.

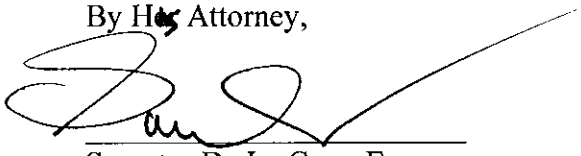
The defendant moves that all the items seized, as well as any statements and any other evidence, whether obtained directly or indirectly as a result of the above-described police actions, be suppressed on the grounds that:

1. The searches, seizures, and the arrest of the defendant were not pursuant to a valid warrant or exigent circumstances.
2. The searches were in violation of Mass. Gen. Laws ch. 276, § 1.
3. The defendant did not waive voluntarily any of her rights under the U.S. Constitution or the Massachusetts Declaration of Rights.
4. There was no legal justification for conducting a warrantless search of the vehicle involved in this case or the occupants.

The defendant contends that because the actions of the police violated rights under the Fourth Amendment to the U.S. Constitution and Article 14 of the Massachusetts Declaration of Rights as well as General Laws ch. 276, § 1, all evidence and fruits

resulting from such actions should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). Please refer to the accompanying affidavit and memorandum of law.

Respectfully Submitted,
OSCAR DELOSANTOS
By His Attorney,



Socrates De La Cruz, Esq.
Attorney for the Defendant
360 Merrimack Street
Lawrence, MA 01843
(978) 681-5858
BBO # 640956

Dated: 8.28.17

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. NEWBURYPORT DISTRICT
DOCKET NO. 17-819

COMMONWEALTH)
)
VS.)
)
OSCAR DELOSANTOS)
Defendant)

AFFIDAVIT OF DEFENDANT OSCAR DELOSANTOS

Under oath, I depose and state that

1. My name is OSCAR DELOSANTOS and I am the defendant in the above-entitled action.

2. On January 19, 2017, the vehicle in which I was traveling as a passenger was blocked in from behind by police.

3. I was ordered to exit the vehicle and pat frisked.

4. I was intimidated by the number of law enforcement officers converging on the scene.

5. No weapons of any kind were located on my person or clothing.

6. Before I was even asked to produce a license and registration, police opened the door to the vehicle and pulled me out of the passenger seat.

7. I was searched without my consent and the vehicle was searched without my consent.

8. I did not knowingly and voluntarily waive any of my constitutional rights on January 19, 2017.

9. I was intimidated by the demeanor and aggressiveness of the officers at the scene.

15. Any statements attributed to me in the police report were not accurate and not truly voluntary.

Signed under the penalties of perjury, this ____ day of August, 2017

OSCAR DELOSANTOS
Oscar Delosantos

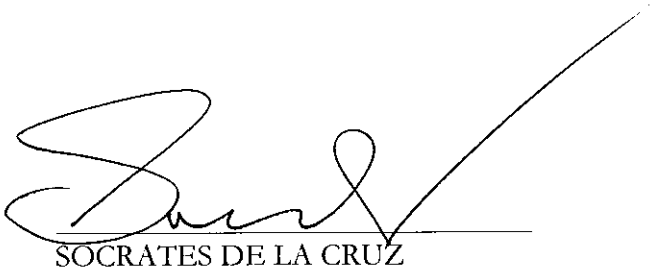
CERTIFICATE OF SERVICE

I, Socrates de la Cruz, counsel for the within named Defendant hereby certify under the pains and penalties of perjury that I have forwarded a true copy of the attached Motions via first class mail, postage prepaid or IN HAND to the following individuals:

Criminal Clerk's Office
NEWBURYPORT DISTRICTCOURT
188 State Street
Route 1 Traffic Circle
Newburyport, MA 01950

Office of the ESSEX COUNTY SUPERIOR Attorney
188 State Street
Route 1 Traffic Circle
Newburyport, MA 01950

Dated: 8.28.17



SOCRATES DE LA CRUZ

> poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting [19] to evade arrest by flight." Id. "Reasonableness" must be "judged from the perspective of a reasonable officer on the scene," at that moment in time. Id. We look only at the objective acts, not the intentions of the officer. Id.
>
> Pérez-Reisler v. Figueroa-Sancha, 2014 U.S. Dist. LEXIS 84593 (D. Ct. of P.R. 2014) at pages 18-19.

The defense argues that the duration of the stop and detention in the case at bar was unreasonable. Neither the driver nor his passenger was a threat to police or others. They made no attempt to run away. The police referred to the stop as a "motor vehicle stop" and mentioned minor traffic law violations yet there was no citation issued for any traffic law violation.

11. MR. DELOSANTOS DID NOT RECEIVE MIRANDA WARNINGS

The defendant submits that the evidence and statements turned over to the police by the vehicle occupants should be suppressed due to the fact that they were entitled to, but did not receive, "Miranda" warnings before purportedly making the statements. Miranda v. Arizona, 384 U.S. 436 (1966). Noticeably absent from the Arrest Report is whether any "Miranda" warnings were administered in Spanish to the vehicle occupants before questioning ensued. Based on a fair reading of the Arrest Report in this matter, questioning by police took place without warnings.

The presence of two uniformed and armed police officers who approached the vehicle in an intimidating manner and persisted in their questioning was enough to create an atmosphere of coercion sufficient to make the driver tell police incriminating facts. The defendant was also coerced into making incriminatory statements. See Commonwealth v. Haskell, 438 Mass. 790 (2002) (when asked whether he had a license to carry a firearm, a custodial interrogation requiring Miranda warnings took place). In this case, both vehicle occupants were asked whether they had a license to carry. The request for testimonial communication by the police entitled the defendant in Haskell to the protections of the Fifth Amendment, including the right

to remain silent. Similarly, in this case, the vehicle occupants were entitled to Miranda warnings before they were coerced into making incriminatory statements. "Miranda warnings are designed to protect the integrity of a suspect's privilege against self-incrimination." Id. at 796 (citation omitted).

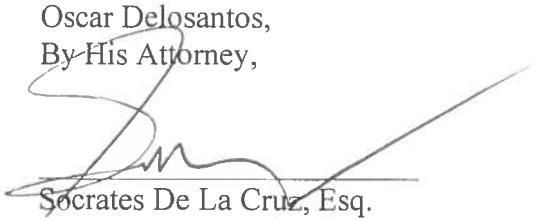
Massachusetts case law has similarly recognized that certain questions or requests "may impermissibly reveal the defendant's thought processes." Commonwealth v. Ayre, 31 Mass. App. Ct. at 21, n.8. The questions asked of the vehicle occupants were clearly of the genre that fall into the category of testimonial evidence. They were calculated to reveal such evidence and went beyond preliminary questioning.

The questioning was the functional equivalent of custodial interrogation. The functional equivalent of express questioning has been defined as "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Pennsylvania v. Muniz, 496 U.S. 582 at 600, 601 citing Rhode Island v. Innis, 446 U.S. 291, 301 (1980). In this case, there can be no question that law enforcement officers at the scene left little room for Mr. Delosantos and his driver not to comply with any of their demands.

Conclusion

The unlawful search and seizures in this matter began with an unjustified initial pursuit of two young Hispanic males in a motor vehicle. Based on less than what the law requires for justification police pursued, stopped, searched and further detained the defendant and his companion. The scope and nature of the search and seizures included unlawful exit orders and extensive questioning without the benefit of Miranda warnings. For the foregoing reasons, the defendant's motion to suppress should be allowed in all respects.

Respectfully Submitted,
Oscar Delosantos,
By His Attorney,



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Date: September 20, 2017

DEC

Commonwealth of Massachusetts

ESSEX, ss

Newburyport District Court
Docket No: 17 22 CR 773
17 22 CR 819

COMMONWEALTH

vs.

Edward J. Perez and
Oscar Delossantos

MEMORANDUM OF DECISION

Facts

On January 19, 2017, Officer David Noyes ("Noyes"), a 27-year veteran police officer was on routine patrol in the city of Amesbury on Macy Street which is also route 110. At approximately 10:14 p.m. Noyes was heading east toward Salisbury when he observed a motor vehicle roll through a stop and then take a quick right onto route 110 without using a directional. Noyes was in a "ghost cruiser" that was not fully marked. He also observed that the license plate was secured with only one screw. Noyes completed a three-point turn to pursue the motor vehicle, a grey Honda with two males inside. Noyes did not activate his lights at that time. Officer Neil Moody ("Moody') was parked at a local business when the Honda passed his location. He ran a motor vehicle query that came back to a male registered owner whose license was expired and non-renewable. He recognized the driver to be a male. Moody then activated his blue lights and pursued the Honda.

The Honda proceeded straight and took a left-hand turn into the parking lot at Cumberland Farms. The Honda had traveled approximately one-tenth of a mile without stopping. The Honda passed by numerous open spots and ultimately parked taking up two spaces instead of one. The two passenger-side tires were in a handicap space. Based on where and how the driver parked it was obvious they did not intend to purchase anything at Cumberland Farms. Both car doors opened quickly and both the driver and front seat passenger began to walk quickly in opposite directions and away from the store. Both defendants kept looking at the officers causing the officers to believe they were going to run. Noyes told the driver to stop and Mooney "painted" the passenger with a taser. Noyes told the driver to get back in the Honda multiple times. After words were exchanged and a lot of "back and forth" the defendants complied. Both got back in the Honda and were ordered to put their hands on the dashboard. Each took their hands off two to three times. Both officers were on high alert and feared for their safety. The

driver had six ID's on him but no active license and was identified as Edward J. Perez ("Perez") and the passenger as Oscar Delossantos ("Delossantos"). Noyes told Moody to remove the passenger Delossantos from the Honda because he kept taking his hands off the dash and putting them near his waist. Delossantos was removed, pat frisked, and moved to the front of the Honda. He had no weapons. The driver, Perez, then took his hand down from the dash and reached with his right-hand lunging for the center console and floor area. Noyes was screaming at Perez to stop reaching. Fearing for his life, Noyes yanked Perez out of the Honda. Both defendants were now out of the motor vehicle. Officer Scott Peters ("Peters") arrived and was ordered by Noyes to check the area where the Perez had lunged. Peters[1] located a loaded handgun inside a grey colored bag.

Neither defendant had a license to carry (LTC). It was confirmed again that Perez did not have a valid driver's license. Delossantos had a felony warrant. As a result the car had to be towed from the scene. The defendants were advised of their Miranda rights. Both defendants spoke English up until the arrest. Once arrested, they claimed they could not speak English. Officer Guillermo from the Salisbury police department was summonsed because he was fluent in Spanish. He re-advised the defendants of their Miranda rights in Spanish. During questioning the passenger Delossantos admitted to trying to hide the firearm. The driver Perez admitted that the firearm was his and that he bought it in Lawrence. Both admitted that they did not have a LTC. No citation was issued for the motor vehicle violations.[2]

Analysis

1. The Stop of the Motor Vehicle

"Where the police have observed a traffic violation, they are warranted in stopping a vehicle." *Commonwealth v. Santana*, 420 Mass. 205, 207 (1995), quoting from *Commonwealth v. Bacon*, 381 Mass. 642, 644 (1980). Thus, the initial stop of the defendant's motor vehicle was justified. When an officer stops a car for an apparent traffic violation and receives a license and registration that are in order, that is the end of the inquiry unless (emphasis added) the officer has a reasonable suspicion, grounded in articulable facts, that the driver or passengers are engaged in the commission of a crime or are about to commit one. *Commonwealth v. Gonsalves*, 46 Mass. App. Ct., 186, 188-189 (1999). Noyes observed the defendant commit two separate motor vehicle infractions: an improperly attached plate and failure to signal. Moody also observed that

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[1]The court credits the testimony of all three officers.

[2]Defense counsel's reliance on the "no fix" statute is misplaced. That statute would only apply to motor vehicle violations not an arrest for carrying a firearm. The failure to issue a citation does not affect the legality of the stop. The police often dispense with minor civil infractions on a complaint when such a serious charge (carrying a firearm) becomes the focal point of the investigation.

the registered male owner of the motor vehicle had no license which also justified a stop of the motor vehicle. The subsequent conduct of the defendants gave the police reasonable suspicion that they were engaged in criminal activity.

The stop was not pretextual. Noyes and Moody did not realize that the males in the car were Hispanic until they exited the motor vehicle in the Cumberland Farms parking lot.

2. Search of the Motor Vehicle

"It is settled that in appropriate circumstances a Terry type search may extend into the interior of an automobile." *Commonwealth v. Almeida*, 373 Mass. 266, 270, 366 N.E.2d 756 (1977). To justify the search the issue is "whether a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger. *Commonwealth v. Santana*, 420 Mass. 212-213, 649 N.E.2d 717, quoting *Almeida*, supra at 271, 366 N.E.2d 756. See *Commonwealth v. Owens,* 414 Mass. 595, 600, 609 N.E.2d 1208 (1993). Therefore the consideration is whether a reasonable belief existed in this matter, recognizing that "while a mere hunch is not enough, see *Commonwealth v. Silva*, 366 Mass. 402, 406, 318 N.E.2d 895 (1974), it does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns." *Commonwealth v. Gonsalves*, 429 Mass. 658, 664, 711 N.E.2d 108 (1999).

Here, the officer confined his search to what "was minimally necessary to learn whether the suspect was armed." *Almeida*, supra, quoting *Commonwealth v. Silva*, 366 Mass. 402, 408, 318 N.E.2d 895 (1974). The officer was justified in fearing that the defendant's purpose in reaching into the console area and floor might be to obtain or hide a gun. See for e.g. *Commonwealth. v. Vanderlinde* 27 Mass.App.Ct. 1103, 534 N.E.2d 811, 813 (1989). Noyes, Moody and Peters were justified in making this search given all that had transpired up to that point.[3]

3. Exit Order

An exit order may be issued for a "valid investigatory purpose." *Commonwealth v. Feyenord*, 445 Mass. 72 (2005). Many of the facts cited in *Feyenord* are present in the instant case: the operator would not following commands; the vehicle was occupied by a passenger; and the conduct of the operator and passenger was highly suspicious. Given their actions as noted by Noyes and Moody and prior observations, the exit order was perfectly justifiable. An exit order may be justified where the order served the "special practical purpose" of "separating those in a stopped car from each other to frustrate interchange of collaboration among them." *Commonwealth v. Riche*, 50 Mass. App. Ct. 830, 833-34 (2001). Police officers are not forced to

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[3]Inevitable Discovery. Although not necessary on these facts, the gun would ultimately have been discovered during an inventory search prior to the Honda being towed. Neither occupant could drive it necessitating a tow.

gamble with their safety. *Commonwealth v. Johnson*, 413 Mass. 598, 602 (1992). A police officer has to consider the real possibility that the defendant had bent forward to conceal or retrieve a weapon and he was not obliged to gamble with his own safety in deciding what to do. *Commonwealth v. Prevost*, 44 Mass. App. Ct. 398, 401 (1998). Noyes took the prudent step of ordering the occupants out. His exit order was proper because a reasonably prudent man in the policeman's position would have been warranted in the belief that his safety and officer Moody's safety was in danger. *Commonwealth v. Santana*, 420 Mass. 205 (1995). The officer must consider the totality of the circumstances that would create a heightened awareness of danger. *Commonwealth v. Stampley*, 437 Mass. 323 (2002). Based on the totality of the circumstances in the case at bar the exit order was justified.

4. Statements

Miranda warnings are only necessary where one is the subject of "custody and official interrogation." *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (Miranda warnings only required when a suspect is both in custody and subject to state interrogation because "[i]t is the premise of Miranda that the danger of coercion results from the interaction of custody and official interrogation"). See *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Commonwealth v. Morse*, 427 Mass. 117, 122-123, 691 N.E.2d 566 (1998); *Commonwealth v. Jung*, 420 Mass. 675, 688, 651 N.E.2d 1211 (1995). Whether a suspect was subject to custodial interrogation is a question of Federal constitutional law. *Morse*, supra at 123, 691 N.E.2d 566. *Commonwealth v. Snyder*, 413 Mass. 521, 531, 597 N.E.2d 1363 (1992). The defendant bears the burden of proving custody. *United States v. Charles*, 738 F.2d 686, 692 (5th Cir.1984). There is no question in this case that the defendants were in custody having been placed under arrest for carrying a firearm.

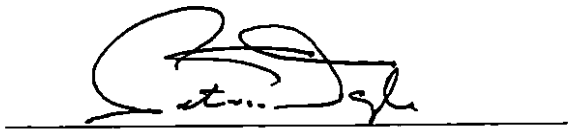
Since the defendants were in custody and the defendants were given the full compliment of Miranda warnings (in English and in Spanish), the issue becomes whether the defendant understood the warnings and made a knowing intelligent and voluntary waiver. The fact that Miranda warnings are given in a language other than the native language of the defendant does not vitiate the validity of the warnings or any subsequent waiver, provided the warnings are set forth adequately. *Commonwealth v. DeSouza*, 428 Mass. 667 (1999). There is no requirement that a non-English speaking defendant be provided and independent interpreter. *Commonwealth v. Ardon*, 428 Mass 496, 499 (1998)(Spanish-speaking police officer read Miranda warnings in Spanish aloud to defendant). The fact that a Salisbury Police officer did the translating is inconsequential on these facts.

The Commonwealth bears the burden of proving, beyond a reasonable doubt, that the waiver of *Miranda* rights is knowing, intelligent, and voluntary. *Commonwealth v. Magee*, 423 Mass. 381, 386 (1996). There was no evidence to suggest that either defendant was coerced, illiterate, of low intelligence or suffering from a mental illness. Considering the totality of the circumstances surrounding the making of the waiver (*Commonwealth v. Edwards*, 420 Mass. 666, 670 (1995), I find that the Miranda warnings were conveyed to the defendants in their native

language and each made a knowing, voluntary and intelligent waiver of those rights when each made admissions to the police. There are no facts on the record which suggest anything to the contrary. The Commonwealth has met its burden.

For the above stated reasons and for the reasons argued by the Commonwealth the motion is DENIED,

SO ORDERED



Peter F. Doyle, Justice

Dated: 11/15/17

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

NEWBURYPORT DISTRICT COURT
NO. 1722 CR 0061

COMMONWEALTH

v.

OSCAR DE LOS SANTOS

MOTION FOR A NEW TRIAL

Pursuant to Mass. R. Crim. P. 30(b), Oscar de los Santos moves to vacate his convictions in the above-numbered case. As grounds for this motion, the defendant states that the convictions were obtained in violation of his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. 12 of the Declaration of Rights. In support of this motion, the defendant submits the accompanying affidavits and memorandum of law.

Respectfully submitted,

Oscar de los Santos,

/s/ Matthew Spurlock
Matthew Spurlock

COMMITTEE FOR PUBLIC
COUNSEL SERVICES
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Boston, Massachusetts 02108
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mspurlock@publiccounsel.net
BBO #601156

CERTIFICATE OF SERVICE

I hereby certify that I have today made service on the Commonwealth by directing that a copy of the defendant's motion for a new trial, affidavits, memorandum in support, appendix, and trial transcripts be delivered, via email to:

Catherine L. Semel
Essex County District Attorney's Office
Ten Federal Street
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catherine.semel@state.ma.us

Michelle Belmonte
Assistant ADA
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/s/ Matthew Spurlock
Matthew Spurlock

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July 27, 2020

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

NEWBURYPORT DISTRICT COURT
NO. 1722 CR 0061

COMMONWEALTH

v.

OSCAR DE LOS SANTOS

AFFIDAVIT OF POST-CONVICTION COUNSEL

I, Matthew Spurlock, state as follows:

1. I am an attorney assigned to represent Oscar de los Santos in an appeal from a December 12, 2018 conviction under G.L. c. 269, § 10(a) in Newburyport District Court case no. 1722CR000061.

2. A timely notice of appeal was not filed following the December 12, 2018 guilty verdict.

3. On September 9, 2019, the defendant filed a late notice of appeal in the Newburyport District Court.

4. On October 29, 2019, the Newburyport District Court (Swan, J.) allowed the defendant's motion to be declared indigent.

5. On November 12, 2019, my appearance was entered to represent the defendant in this case.

6. On November 25, 2019, the Appeals Court single justice (Sacks, J.) deemed the defendant's notice of appeal timely nunc pro tunc.

7. On March 9, 2020, the appeal was docketed in the Appeals Court.

8. Upon reviewing Mr. de los Santos' appeal, I concluded that trial counsel was constitutionally ineffective in failing to file a viable motion to suppress evidence and statements on two bases:

i. The disproportionate force used by the officers, without probable cause, when they pointed, aimed, and "painted," Mr. de los Santos with a Taser weapon upon stopping the vehicle in which he was a passenger.

ii. The Commonwealth's failure to meet its burden to establish the substance of the *Miranda* warnings allegedly given to Mr. de los Santos, by testimony or evidence.

9. Suppression of the evidence and statement would have fatally undermined the Commonwealth's case against Mr. de los Santos. The legal and factual grounds for these claims are explained in the accompanying memorandum.

10. Trial counsel failed to consider either grounds for suppression. An affidavit from trial counsel is attached to this motion.

11. Also attached to this motion is an appendix containing relevant documents, as well as transcripts of the motion hearing and trial.

12. On June 25, 2020, the Appeals Court stayed Mr. de los Santos' direct appeal of the conviction to permit him to file this motion for a new trial.

Signed under the pains and penalties of perjury, this 27th day of July, 2020.

/s/ Matthew Spurlock
Matthew Spurlock

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BBO #601156

CERTIFICATE OF SERVICE

I hereby certify that I have today made service on the Commonwealth by directing that a copy of the defendant's motion for a new trial, affidavits, memorandum in support, appendix, and trial transcripts be delivered, via email to:

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Michelle Belmonte
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/s/ Matthew Spurlock
Matthew Spurlock

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July 27, 2020

any history of violent crime. All of these factors demonstrate the unreasonableness of "painting" Mr. de los Santos with the Taser weapon as he was walking away from the car.

For all these reasons, pointing, aiming, and "painting" Mr. de los Santos with a Taser weapon escalated the seizure into an arrest that lacked probable cause. Because trial counsel failed to move to suppress on this basis, the court did not conduct a "highly fact-specific . . . assess[ment] [of] the reasonableness of the officer's conduct . . . view[ing] the facts and circumstances as a whole," *Santiago*, 93 Mass. App. Ct. at 795, under an objective standard. *Borges,* 395 Mass. at 792, 792 n.3. Such an analysis, which was required to effectively represent the defendant, would have compelled suppression of the fruits of the arrest, for which the officers lacked probable cause. *Santiago*, 93 Mass. App. Ct. at 794, 799 (suppressing firearm discovered subsequent to disproportionate use of force). Trial counsel was therefore ineffective in failing to move to suppress on this ground.

II. The constitutional protections against self-incrimination require suppression of Mr. de los Santos' statement where the Commonwealth did not establish that he was fully advised of the *Miranda* rights.

A. Trial counsel was ineffective in failing to hold the Commonwealth to its burden to establish the substance of the *Miranda* warnings.

Over fifty years ago, *Miranda* established that "prior to any questioning" the suspect in custody must be informed that "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). These warnings, the Supreme Court explained, are "an absolute prerequisite to interrogation." *Id.* at 471. Without them, the waiver of the defendant's constitutional protection against self-incrimination cannot be "knowing and intelligent." *Id.* at 492. Moreover, under art. 12, the

Commonwealth must establish the validity of the defendant's waiver "beyond a reasonable doubt." *Commonwealth v. Hoyt*, 461 Mass. 143, 152 (2011).

It is the Commonwealth's burden to "demonstrate that the defendant was fully advised of his rights." *Commonwealth v. Adams,* 389 Mass. 265, 269 (1983). And if the *Miranda* "prerequisites have not been fully met, the confession is without more involuntary as a matter of law, hence inadmissible and insubmissible." *Id.* at 270, citation omitted. The Commonwealth may meet its burden through testimony as to the substance of the warnings, or by submitting the *Miranda* card (if the warnings were read from the card) in evidence. *Commonwealth v. Ayala,* 29 Mass. App. Ct. 592, 596 (1990). Here, the Commonwealth did neither.

The only relevant *Miranda* warning was given by Officer Juan Guillermo, a Spanish-speaking officer from the Salisbury Police department, called to the scene because the other officers did not speak Spanish. [I:87-88; 19][16] See *Commonwealth v. Seng*, 436 Mass. 537, 544=546 (2002) (Commonwealth bears "heavy burden" of demonstrating that defendant advised of rights in language he can comprehend). Officer Guillermo did not testify at the motion to suppress, although he stated at trial that he translated the *Miranda* warnings from an English-language card he carried into Spanish. [IV:197] Neither Officer Noyes, Officer Moody, nor Officer Peters provided any details regarding the content of the *Miranda* warnings they assumed that Officer Guillermo translated for Mr. de los Santos. [I:34-35; I:74, I:87-88] Indeed, Officer Peters testified that he could not recall whether Officer Guillermo advised Mr. de los Santos of the *Miranda* rights at all. [I:87] For his part, Officer Noyes merely testified that Officer Guillermo "advised them of their rights," [I:19] and that the driver and Mr. de los

[16] Officer Scott Peters testified that he advised Mr. de los Santos of the *Miranda* rights in English, before Officer Guillermo was called to the scene because he "didn't know how well English [Mr. de los Santos and the driver] spoke." [I:88]

Santos "appear[ed] to understand them once they were given in Spanish." [I:21] Officer Moody summarily stated that he "kn[e]w that the *Miranda* was read to them at the scene." [I:74] But, of course, because none of these officers (save Officer Guillermo) spoke Spanish, they could not have understood any exchange between Officer Guillermo and Mr. de los Santos, much less confirmed that Officer Guillermo completely and accurately advised the defendant as required by the federal and state constitutions.

At the motion hearing, the Commonwealth did not introduce the English-language *Miranda* card used by Officer Guillermo in evidence. The Amesbury police "*Miranda* form" signed by Mr. de los Santos and submitted by the Commonwealth in evidence [I:70] was administered and signed at the station, not at the site of the arrest, where the statement was made. [I:74, 33] See [A14][17] So it was irrelevant to the Commonwealth's key evidence about Mr. de los Santos's statement: that he was hiding the gun *from* – or *for*, in another version of the translation – the driver.[18] In short, there was no evidence of the substance of the warnings that Mr. de los Santos actually received before making that statement.

In light of these facts, the motion judge's conclusion that Mr. de los Santos was "given the full complement of Miranda warnings (in English and Spanish)" is not supported by the evidence. [A36] More to the point, trial counsel's failure to move to suppress the statement, on the basis that the Commonwealth had not established the substance of the warnings, deprived Mr. de los Santos of a substantial ground of defense against the Commonwealth's key evidence. *Saferian*, 386 Mass. at 96. Had trial counsel correctly apprehended the law, the absence of *any* evidence concerning the substance of the warnings (testimonial or

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[17] Moreover, the Amesbury police form was not the "card" that Officer Guillermo, a Salisbury Police Department officer [IV:189] "carr[ied]" with him and translated from English into Spanish for Mr. de los Santos. [IV:197]

[18] For inconsistency in translation compare [I:34-35] (hide *from* driver) with [IV:45] (hide *for* driver).

documentary) would have put him on notice that a motion to suppress was not only viable, but would have succeeded.

To emphasize, there was *no* testimony concerning the substance of the warnings given to Mr. de los Santos prior to his statement. Officer Guillermo, who was said to have translated the warnings from English into Spanish, did not testify at the motion to suppress. And none of the other officers spoke Spanish, so their testimony that they "kn[e]w that the *Miranda* was read to them on the scene," [I:74] is baseless, and certainly cannot establish that the warnings was actually (and fully) sufficient to establish the validity of the wavier "beyond a reasonable doubt." *Hoyt*, 461 Mass. at 152. Compare *Commonwealth v. Mitchell*, 47 Mass. App. Ct. 178, 181 (1999) (second officer corroborated that first officer advised defendant of Miranda rights from a card, all English-speaking).

Trial counsel's challenge to the admission of Mr. de los Santos' sole statement relied exclusively on the proposition that he "did not receive Miranda warnings," because the police report did not mention that the warnings were given in Spanish. [A30] It failed to address (or rebut) testimony by the officers at the motion hearing that he did receive the warnings in Spanish, and omitted the Commonwealth's failure to establish the substance of the warnings either by testimony (which none of the English-speaking officers at the hearing could give) or documentary evidence (also absent).[19] Trial counsel could – and should – have asserted Mr. de

[19] As trial counsel's affidavit explains, he "did not consider . . . the Commonwealth's failure to meet its burden to establish that Mr. de los Santos was fully informed of all of the Mirada warnings in Spanish." Aff. of Trial Counsel ¶ 4a.

There is no plausible strategic reason for failing to hold the Commonwealth to its burden. In any event, any such strategic calculation would have been "manifestly unreasonable." *Acevedo*, 446 Mass. at 442.

los Santos' right to insist that the Commonwealth "prove affirmatively" that he was actually given proper warnings. *Adams,* 389 Mass. at 270.[20]

At trial, counsel missed a second chance to vindicate Mr. de los Santo's rights against self-incrimination under the state and federal constitutions. As the Supreme Judicial Court explained, "[e]ven if the defendant has not moved to suppress his statements the burden is still on the Commonwealth, upon seasonable objection, to prove affirmatively, that the statements were properly obtained" by establishing that "the *Miranda* prerequisites" have been fully met. *Adams,* 389 Mass. at 270. See also *Commonwealth v. Flore*k, 48 Mass. App. Ct. 414, 419 (2000)(same). Although counsel cross-examined Officer Guillermo at trial about his lack of training as an interpreter, [IV:196] he failed to assert the Commonwealth's duty to "prove affirmatively" that the full and accurate *Miranda* warnings were given in Spanish. *Id.* Such a challenge – had trial counsel raised it – would have been particularly effective in light of the interpretive challenges explored at trial. [IV:197-198].

The failure to hold the Commonwealth to its burden – whether by testimony or the card itself – was ineffective, and deprived Mr. de los Santos of a substantial ground of defense. Assuring that a custodial suspect like Mr. de los Santos receive accurate and complete warnings is not a mere formality. "[N]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings [the Court] delineate[d] have been given." *Miranda*, 384 U.S. at 470. As the Supreme Court has explained time and again, a constitutionally adequate advisement must contain each of the warnings set out *Miranda* or a "fully effective equivalent." *Miranda*, 384 U.S. at 476, that "communicate[s] the same essential message." *Florida v. Powell,* 559 U.S. 50, 64 (2010). Massachusetts courts are

[20] It bears repeating that the *Miranda* form introduced as evidence at the hearing was irrelevant to this burden, because it was administered and signed at the station, after the only statement that the Commonwealth sought to admit. See *supra* n. 9.

even more protective, and "exclude[] the fruits" of statements made pursuant to inadequate or defective *Miranda* warnings when the federal rule "proves inadequate to the task." *Commonwealth v. Martin,* 444 Mass. 213, 218, 221 (2005) (higher standard afforded by art. 12).

It is the Commonwealth's burden to establish that the warnings given echoed each of the advisements set out in *Miranda*, not the defendant's burden to prove that the warnings were defective. To suppress the statement, in other words, trial counsel needed merely to have held the Commonwealth to its burden, at a hearing where the Commonwealth failed to present *any* evidence concerning the substance of the warnings. An officer's general assertion that he overheard another officer give the warnings in a language he does not speak or understand is not sufficient. The reason is simple. Defective, incomplete, or inaccurate warnings are a real risk. See, e.g., *Seng,* 436 Mass. at 543-544 (warnings defective in multiple respects); *Adams,* 389 Mass. at 269 (warnings failed to advise defendant that any statements could be used against him); *Commonwealth v. Coplin*, 34 Mass. App. Ct. 478, 481-483 (1993) (same). The complete absence of evidence concerning the content of the warnings here allowed the Commonwealth to skirt this constitutional threshold.

Holding the Commonwealth to its burden is especially important where the warnings were translated into Spanish from an English-language card. The *Miranda* warnings – or their functional equivalent – are specific, and their "essential information must be conveyed." *Powell*, 559 U.S. at 60. And they are prone to mistranslation, even when they are translated in writing. See *Seng*, 436 Mass. at 544 ("Khmer version of the rights was deficient in several key respects"). That risk is even greater here, where the card was in English and translated, in the heat of the moment, into Spanish by an officer without any specialized training. Compare *Commonwealth v. Alves*, 35 Mass. App. Ct. 935 (1993) (Portuguese-speaking officer reading from Portuguese-language *Miranda* card); *Commonwealth v. Bins*, 465 Mass. 348, 410-411 (2013)

(contents of Portuguese-language *Miranda* sign, read to defendant at station by Portuguese-speaking officer, admitted at trial as "translated by a certified court interpreter").

Trial counsel's failure to hold the Commonwealth to its burden to "prove affirmatively" the substance of the warnings, *Adams*, 389 Mass. at 270, also stymied any questioning regarding the accuracy of the card, and the translation from the English-language card into Spanish. Compare *Commonwealth v. The Ngoc Tran*, 471 Mass. 179, 182-183 (2015) (Vietnamese-speaking officer testified with specificity concerning contents of *Miranda* warnings given to defendant). In the absence of this constitutionally required showing, trial counsel was left to cast doubt on Officer Guillermo's skill as a translator. [IV:196-198] But that generalized inquiry was unmoored from the constitutional requirement that the Commonwealth establish that the *Miranda* warnings were properly given. As such, it was inadequate to uphold Mr. de los Santos' rights under the Fifth Amendment, much less the heightened burden in Massachusetts, that the Commonwealth "demonstrate beyond reasonable doubt" that Mr. de los Santos "has chosen to waive the right to silence and counsel." *Clarke*, 461 Mass. at 349. Trial counsel's failure to demand this required showing constituted ineffective assistance.

B. Without the improperly admitted statement there was insufficient evidence to convict Mr. de los Santos

Where the *Miranda* "prerequisites have not been fully met, the confession is without more involuntary as a matter of law, hence inadmissible and insubmissible." *Adams*, 389 Mass. at 270. Counsel's failure to hold the Commonwealth to its burden "deprived the defendant of an otherwise available ground of defence." *Saferian*, 386 Mass. at 96. Indeed, due to counsel's omission, the "Commonwealth offered no evidence" to meet its threshold constitutional burden. *Id.* As explained above, there was no justification for this omission.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. NEWBURYPORT DISTRICT COURT
NO. 1722 CR 0061

COMMONWEALTH
v.
OSCAR DE LOS SANTOS

AFFIDAVIT OF TRIAL COUNSEL

I, Socrates de la Cruz, do hereby aver that:

1. I am an attorney licensed to practice in the State of Massachusetts.

2. I represented the defendant, Oscar de los Santos, in the above-referenced matter in the Newburyport District Court, including at the motion to suppress and jury trial.

3. I filed a motion to suppress in the above-referenced case, in which I raised as grounds for suppression a number of issues related to the lawfulness of the stop and search of the vehicle where Mr. de los Santos was a passenger, and his statements to the police.

4. In filing this motion, I did not consider the following grounds for suppression:

    a. the disproportionate use of force, when an officer targeted Mr. de los Santos with a taser upon his exit from the vehicle, under art. 14; and

    b. the Commonwealth's failure to meet its burden to establish that Mr. de los Santos was fully informed of all of the Miranda warnings in Spanish.

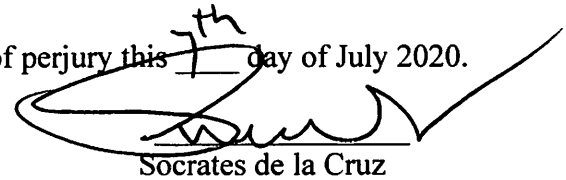
5. In filing my motion, I did not raise the following ground for suppression, because in my opinion it was not a viable ground to suppress based on the state of the law:

    a. the initial stop of the car in which Mr. de los Santos was a passenger, based on the vehicle owner's unlicensed status, under art. 14.

6. The Court (Doyle, J.) held a hearing on the motion to suppress on September 6, 2017 and denied the motion to suppress on November 15, 2017.

7. On December 12, 2018 a jury convicted Mr. de los Santos of possession of a firearm without a license. He was found not guilty of possession of a loaded firearm without a license. The Court (Swan, J.) allowed Mr. de los Santos' motion for a required finding of not guilty on the disorderly conduct charge.

Sworn to under the pains and penalties of perjury this 7th day of July 2020.



Socrates de la Cruz

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. NEWBURYPORT DISTRICT COURT
NO. 1722 CR 0061

COMMONWEALTH

v.

OSCAR DE LOS SANTOS

AFFIDAVIT OF OSCAR DE LOS SANTOS

I, Oscar de los Santos state the following:

1. I am the defendant in the above-entitled action.

2. On January 19, 2017, the vehicle in which I was travelling as a passenger was blocked in by the police.

3. As stated in my earlier affidavit, filed on the motion to suppress, I did not knowingly or voluntarily waive any of my constitutional rights.

4. As stated in my earlier affidavit, any statements attributed to me in the police report were not accurate and not voluntary.

5. I do not speak or understand English.

6. At some point after I was removed from the vehicle a Spanish-speaking officer arrived. The Spanish-speaking officer never gave me the "Miranda" warnings. I have now learned that the "Miranda" warnings are supposed to consist of informing me that I have (1) the right to remain silent, (2) that anything I said could be used against me at trial, (3) that I have the

right to the presence of an attorney during questioning, (4) that if I could not afford an attorney, one would be appointed to me at no expense prior to any questioning, and (5) that if I decided to waive my Miranda rights, I may stop answering questions at any time. The Spanish-speaking officer never told me any of these things.

Signed under the pains and penalties of perjury, this 9 day of 11, 2020.

Oscar de los Santos

Oscar de los Santos

ESTADO DE MASSACHUSETTS

ESSEX, ss.

TRIBUNAL DISTRITAL DE NEWBURYPORT
NO. 1722 CR 0061

ESTADO

contra

OSCAR DE LOS SANTOS

DECLARACIÓN JURADA DE OSCAR DE LOS SANTOS

Yo, Oscar de los Santos, declaro lo siguiente:

1. Soy el acusado del caso arriba indicado.
2. El 19 de enero del 2.017, el vehículo en el cual yo viajaba de pasajero fue bloqueado por la policía.
3. Conforme lo he expuesto en mi previa declaración jurada, misma que fue sometida junto con la moción para suprimir pruebas, no renuncié a ninguno de mis derechos constitucionales voluntaria ni conscientemente.
4. También conforme lo he expuesto en mi previa declaración jurada, todas las declaraciones atribuidas a mi persona dentro del informe policiaco no son acertadas ni voluntarias.
5. No hablo ni entiendo el idioma inglés.
6. En algún momento después de que me sacaron del vehículo, un agente policial llegó a la localidad. Este policía de habla hispana jamás me avisó de las llamadas advertencias «Miranda». Me he enterado recientemente que las advertencias «Miranda» deberían

consistir en informarme de (1) el derecho de permanecer en silencio, (2) que toda cosa que pudiera decir [bajo custodia] podría emplearse en mi contra en un juicio, (3) que cuento con el derecho de tener a un abogado presente conmigo durante cualquier interrogatorio, (4) que si yo no pudiera pagarle a un abogado, uno me sería asignado sin costo para mi antes de proseguir con el interrogatorio, y (5) que si yo decidiera renunciar a mis derechos Miranda [para contestar preguntas], podría parar el interrogatorio en cualquier momento y dejar de contestarle a la policía sus preguntas. El policía de habla hispana jamás me avisó de ninguna de estas cosas.

Firmado bajo las penas y sanciones por el perjurio, este _____ día de _____ del 2.020.

_____

Oscar de los Santos

Certificación del traductor

Este documento, que consiste de dos hojas escritas a máquina, el original del cual fue redactado en el idioma inglés y mismo que es una comunicación confidencial entre el abogado Matthew Spurlock y su cliente, el Señor Oscar de los Santos, lo tradujo al español el intérprete y traductor jurídico certificado, Ricardo Manuel Valladares y Méndez, aprobado en julio del año mil novecientos noventaicuatro para rendir traducciones de índole jurídico por autoridad otorgada según lo dispuesto en los Estatutos Generales de Massachusetts, Capítulo 221C, sección 7 [M.G.L. 221C, § 7]

Doy fe de que la anterior traducción del idioma inglés al idioma español se ha llevado a efecto empleando mis máximos conocimientos, habilidades, formación, capacidad y experiencia.

Ricardo M. Valladares
[Firma electrónica]
Intérprete Jurídico Titulado

Aldea de Byfield, Condado de Essex, Estado de Massachusetts, este vigesimosexto día del mes de octubre del año dos mil veinte [26/X/2.020]. FIN

Commonwealth of Massachusetts

ESSEX, ss

Newburyport District Court
Docket No: 1722 CR 00061

COMMONWEALTH

vs.

OSCAR DELOSSANTOS

MEMORANDUM OF DECISION

The defendant, Oscar Delossantos, (defendant) was found guilty by a six person jury of carrying a firearm without a license in the Newburyport District Court on December 12, 2018. The defendant was represented at trial by attorney Socrates De La Cruz (De La Cruz), a competent and well-respected private attorney from Lawrence who has appeared often before this judge. Prior to trial, the defendant filed a motion to suppress which was denied by the court in a decision dated November 15, 2017. Specific findings of fact were made in that decision.1 The defendant has now filed a motion for a new trial based upon inadequate assistance of counsel. The thrust of that motion is that De La Cruz was ineffective in the motion to suppress pleadings and hearing. At the hearing on this motion for new trial, the defendant submitted pleadings, affidavits and a transcript for the court to review. An evidentiary hearing was not held.

Motion for a New Trial

Pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), a judge may allow a motion for a new trial "if it appears that justice may not have been done." The standard for review of a judge's decision on a postconviction motion for a new trial is "abuse of discretion." See *Commonwealth v. Preston*, 393 Mass. 318, 324 (1984).

Standard for Ineffective Assistance of Counsel

Where a new trial motion is based on ineffective assistance of counsel, the familiar

1 To the extent necessary, further findings are made in this decision in that the court previously credited the testimony of all three testifying officers.

standard used to analyze such a claim is "whether there has been serious incompetency, inefficiency, or inattention of counsel - behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer - and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defense." *Commonwealth v. Saferian*, 366 Mass, 89 96 (1974). See *Commonwealth v. Donlan*, 436 Mass. 329, 333 (2002). See also *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (ineffective assistance occurs when trial counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"). A strategic or tactical decision by counsel will not be considered ineffective assistance unless the decision was "manifestly unreasonable" when made. *Commonwealth v. Martin*, 427 Mass. 816, 822 (1998). See *Commonwealth v. Adams*, 374 Mass. 722, 728 (1978). Further, mere speculation, without more, is insufficient to establish ineffective representation. See *Commonwealth v. Duran*, 435 Mass. 97, 103 (2001). Counsel is not ineffective "because of retrospective differences of opinion about judgments formed, or tactics used by the trial lawyer during the trial; … because of retrospective opinions that different tactics or strategy might have been more successful than those used by the trial lawyer or because a different or better result might have been obtained by a different lawyer." *Commonwealth v. Bernier*, 359 Mass. 13, 19 (1971).

Burden for Ineffective Assistance of Counsel

The burden of a motion for new trial based on ineffective assistance of counsel, rests entirely on the defendant. "The burden of proving entitlement to a new trial based on ineffective assistance of counsel rests on the defendant. See *Commonwealth v. Comita*, 441 Mass. 86, 90, 803 N.E.2d 700 (2004). A defendant must show that better work might have accomplished something material for the defense. See *Commonwealth v. Acevedo*, 446 Mass. 435, 442, 845 N.E.2d 274 (2006); *Commonwealth v. Satterfield*, 373 Mass. 109, 115, 364 N.E.2d 1260 (1977)." *Commonwealth v. Watson*, 455 Mass. 246 at 256. The standard that the defendant must meet to secure a new trial on the claim of ineffective assistance is high: "whether there has been serious incompetency, inefficiency, or inattention of counsel … behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer … and, if that is found,

then typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defense." *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). The question of assistance of counsel is evaluated "as a practical not an abstract matter." *Id.* at 98. "[T]he arguably reasoned tactical or strategic judgments of a lawyer," *Commonwealth v. Rondeau*, 378 Mass. 408, 413 (1979), "are virtually unchallengeable," and cannot give rise to a proper claim of ineffective assistance unless they are "manifestly unreasonable." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). "A strategic decision by counsel will be deemed constitutionally ineffective only if it was manifestly unreasonable at the time it was made." *Commonwealth v. Adams*, 374 Mass. 722, 728-730 (1978). Counsel is not ineffective "because of retrospective differences of opinion about judgments formed, or tactics used by the trial lawyer during the trial; … because of retrospective opinions that different tactics or strategy might have been more successful than those used by the trial lawyer or because a different or better result might have been obtained by a different lawyer." *Commonwealth v. Bernier*, 359 Mass. 13, 19 (1971). To establish prejudice "[i]t is not enough for the defendant to show that [counsel's] errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test … and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Commonwealth v. Amirault*, 3 424 Mass. 618, 652 (1997), quoting *Strickland v. Washington*, 466 U.S. at 693. Rather, a reviewing court must undertake "a discerning examination and appraisal of the specific circumstances of the given case." *Delle Chiaie v. Commonwealth*, 367 Mass. 527, 536-537 (1975).

Substantial Issue

The Defendant has failed to raise a substantial issue in his submissions to the court. The affidavits filed in support of this new trial motion do not raise a substantial issue relative to ineffective assistance and an evidentiary hearing is not needed or warranted. "On a motion for a new trial, the judge may rule on the motion "on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits." Mass. R.Crim. P. 30(c)(3), 378 Mass. 900 (1979). Assessment of whether the motion and supporting materials suffice to raise a "substantial issue" involves consideration of the seriousness of the issue itself and the adequacy of the showing that has been made with respect to that issue. See *Commonwealth v. Arriaga*, supra at 571, 781 N.E.2d 1253," *Commonwealth v. Goodreau*, 442

Mass. 341 at 348. The defendant's burden at this stage is clear: to make an adequate factual showing, a defendant must, at a minimum, submit affidavits that contain sufficient credible information to raise a prima facie case. "A defendant's submissions in support of a motion for a new trial need not prove the factual premise of that motion, see *Commonwealth v. Licata*, 412 Mass. 654, 662, 591 N.E.2d 672 (1992), but they must contain sufficient credible information to "cast doubt on" the issue. *Commonwealth v. Britto*, 433 Mass. 596, 608, 744 N.E.2d 1089 (2001)." *Id*. "If the theory of the motion, as presented by the papers, is not credible or not persuasive, holding an evidentiary hearing to have the witnesses repeat the same evidence (and be subject to the prosecutor's cross-examination further highlighting the weaknesses in that evidence) will accomplish nothing." *Id*. At 349.

In the present case, the defendant contends that trial counsel was ineffective for failing to pursue both a motion to suppress based upon excessive use of force, a motion to suppress statements and further ineffectiveness for failing to challenge the admission of that statement at trial. What remains deficient with respect to the new trial motion, as it was at the motion to suppress stage, is a sufficient, credible affidavit from the defendant or his trial counsel. Based upon the affidavits filed in this matter, the defendant has failed to raise a substantial issue as discussed further below.2

Burden for Ineffective Assistance Based Upon a Motion to Suppress

Motion counsel asserts trial counsel was ineffective because he failed to pursue two different theories with regard to a motion to suppress. "To prevail on a claim of ineffective assistance of counsel in regard to a motion to suppress, the defendant must demonstrate that the evidence would have been suppressed if properly challenged, and that counsel's failure to pursue such a challenge created a substantial likelihood of a miscarriage of justice. S*ee Commonwealth v. Banville*, 457 Mass. 530, 534, 931 N.E.2d 457 (2010); *Commonwealth v. Williams*, 453 Mass. 203, 207, 900 N.E.2d 871 (2009)." *Commonwealth v. Cavitt*, 460 Mass. 617. (emphasis added). It is not ineffective assistance of counsel when trial counsel declines to file a motion to suppress based upon a theory that has little chance of success. *Commonwealth v. Conceicao*, 388 Mass

2 The court does not credit any of the affidavits submitted by the defendant.

255 (1983).

The stop of the defendant and "painting."

1. The Stop.

The stop of the motor vehicle was justified based upon observed traffic violations (failure to signal and improperly attached plate). Moody was justified in the stop of the vehicle based upon information that the registered owner of the car did not have a valid license. See Memorandum of Decision.

2. Pointing and painting with the Taser

Probable cause to make an arrest is not required for an officer to show force to protect themselves or others. "And we emphasize that even when police lack probable cause to arrest, they may draw their guns or otherwise show force, to protect themselves or others, when such a display is "proportional ... to the degree of suspicion" based on all relevant circumstances." *Commonwealth v. Santiago*, 93 Mass. App. Ct. 792 at 799, citing *Commonwealth v. Willis*, 415 Mass. At 819. "The Constitution does not require officers 'to gamble with their personal safety,' *Commonwealth v. Robbins*, 407 Mass. 147, 152 [552 N.E.2d 77] (1990), and police officers conducting a threshold inquiry may take reasonable precautions, including drawing their weapons, when the circumstances give rise to legitimate safety concerns." *Commonwealth v. Haskell*, 438 Mass. 790, 794, 784 N.E.2d 625 (2003). "Such steps do not automatically turn a stop into an arrest." *Commonwealth v. Dyette*, 87 Mass. App. Ct. 548, 556, 32 N.E.3d 906 (2015), quoting from *Commonwealth v. Williams*, 422 Mass. 111, 117, 661 N.E.2d 617 (1996)." *Santiago* at 795. "When considering a vehicle stop, "we also look to the number of police used to effectuate the stop and whether the movement of the automobile was impeded." *Commonwealth v. Sanderson*, 398 Mass. 761, 766, 500 N.E.2d 1337 (1986)." Id.

This was not a routine traffic stop as outlined in the Commonwealth's brief. From the moment Noyes first observed the defendant's motor vehicle at 10:15 p.m. it was obvious that there was nothing standard about the later stop. When the defendant first observed Noyes he looked at him "wide eyed" and the driver took a "quick right and accelerated away." Noyes observed the plate to be hanging by only one screw. In addition the vehicle did not pull over right away despite having ample opportunity to do so. It also passed multiple spots in the front of

the Cumberland Farms parking lot finally parking at an angle in two spaces blocking a handicap spot near the left side of the building. Both occupants exited the vehicle but did not head into the store. "Both jumped out quickly and like they were going to run." Both moved in opposite directions. The occupants were told numerous times to stop. Both officers had to yell to get the occupants to comply. The defendant stopped and just looked at Moody. Moody "painted" the defendant with his taser but did not deploy it. The defendant then got back in the car and was ordered to put his hands on the dash. The defendant contends that the use of force was not proportional. In fact, no force was used because the taser was never deployed. There was only a display of force.

Based on the facts and circumstances of this case, it was reasonable and a proportional show of force for Moody to draw and point his taser. The defendant could have been armed when he left the vehicle. The fact that he was walking away initially is not dispositive and does not eliminate a potential threat. The defendant could have turned around at any time with a weapon. As it turned out, and luckily for all, he had left the firearm in the car. When asked by the court whether he had any case authority to support his position on the issue of display of force with a taser, defense counsel responded that he did not. It is difficult to say that a lawyer was ineffective when no case law can be cited to support such a position.

Miranda Warnings

The motion to suppress in this case filed by trial counsel was titled "MOTION TO SUPPRESS EVIDENCE AND STATEMENTS". The word statements is used a total of three times within the body of the motion, including the title. At no point do the words or case cite, *Miranda* or *Miranda v. Arizona*, appear. The affidavit of the defendant, as discussed does not provide much further detail. Neither the motion, nor the affidavit, specifically challenged the adequacy, accuracy or voluntariness of the warning and subsequent waiver. The Appeals Court addressed a similar issue in *Commonwealth v. Johnston*, 60 Mass. App. Ct. 13 (2003). In that case, the defendant was advised of his Miranda rights on a police department issued form. The defendant moved to suppress certain statements at the trial stage on the basis that he had not been advised of his Miranda rights. On appeal, the defendant alleged the rights he was advised were defective. The Appeals Court declined to find error in the trial judge's findings on the motion to

suppress. "There is a significant difference between a claim that Miranda warnings were not provided prior to questioning and a claim that a warning was given but was defective in some way. In the first instance, the attention of the judge and of opposing counsel is directed to whether warnings were given at all. In the second instance, attention is directed to the quality and accuracy of the warnings that were given and, perhaps, to the defendant's understanding of the warnings." *Johnston* at 20. Further, "As the issue has been framed, we detect no error: the motion judge did not err in denying the defendant's motion to suppress on the grounds that were presented to him." See *Commonwealth v. Amirault*, 424 Mass. 618, 641 n. 15, 677 N.E.2d 652 (1997) ("a right that must be claimed is not denied if it is not claimed, and the proceeding in which the claim is not made is, in that respect, wholly free from error"). We are not obliged on appeal to address new arguments in support of rule 13 motions to suppress that were not argued before the trial judge." *Id*.

It is likely that had the motion been more specific, or in the case of trial filed at all, the Commonwealth would have defended it differently. The Johnston court did leave an avenue for relief, a motion for new trial and possible ineffective assistance claim. "This is not to say that the substantive issue presented by the defendant is insignificant. Trial counsel's failure to raise the issue may have constituted ineffective assistance of counsel. We are not, however, prepared to assess the merits of any such claim on this record." *Id*. at 22 The reason the court could not determine such an argument from the basis of the record was two-fold: the first, that the record does not contain sufficient facts for a determination regarding the Miranda issue, and the second, that there may be another explanation for trial counsel's seeming ineptitude: strategy. "We cannot say that counsel's failure to raise the issue was not a tactical choice. For example, it is possible that counsel was aware that the defendant in fact understood this right. See *Commonwealth v. Squailia*, 429 Mass. 101, 110–111 & n. 7, 706 N.E.2d 636 (1999); *Commonwealth v. Brown*, 57 Mass.App.Ct. 326, 332, 782 N.E.2d 1105 (2003) (failure to move to suppress statements was tactical choice)." *Id*. at 22 n. 8. And further, "Whether the defendant received the functional equivalent of all of the required warnings is, in these circumstances, a question of fact best resolved in a trial court rather than an appellate court." *Id*.

Though not evident from motion counsel's filings, this theory has support in the record before the court. "Trial tactics which may appear questionable from the vantage point of

hindsight... do not amount to ineffective assistance unless 'manifestly unreasonable' when undertaken." *Commonwealth v. Haley*, 413 Mass. 770, 777-778 (1992), citing *Commonwealth v. Sielicki*, 391 Mass. 377, 379 (1984). The Commonwealth highlighted the fact that both trial counsel's affidavit in support of this motion, and the defendant's affidavit in support of the motion to suppress omit a key issue: the English/Spanish divide explored by motion counsel. As noted, the affidavits are silent as to this theory. In light of the defense's extensive cross-examination of Officer Guillermo at trial, and subsequent request for the Humane Practice Doctrine instruction, it is clear that trial counsel was aware of the issue surrounding translation, adequate advisement of rights and the statement ascribed to his client, but chose to pursue a different avenue of attack.

The court previously made findings that Miranda warnings were given. It strains credulity that an officer from a neighboring department would be called in to assist and give Miranda warnings and then somehow fall short in completing the one task he was asked to perform. The Commonwealth met its burden in establishing that Miranda rights were given in a language that the defendant understood and that he voluntarily waived those rights.3

There is a significant difference between a claim that Miranda rights were not provided prior to questioning and a claim that a warning was given but was defective in some way. This is not ineffective assistance of counsel. Motion counsel proceeded on a theory that Miranda warnings were never given which is what his client put in his affidavit in support of the motion to suppress. This court decided this issue based upon how the issue had been framed, namely whether the rights were given. A finding was made that they were given.

CONCLUSION

After review of the entire motion transcript, the contents of the clerk's file, the affidavits and all of the documents submitted, I find that the defendant's claim of ineffective assistance of counsel is without merit. For the reasons stated above, and for the reasons cited in the Commonwealth's memorandum, the defendant's motion for a new trial is DENIED.

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3 Judge Swan gave a humane practice instruction at trial.

SO ORDERED

Dated: 1-20-21

Peter F. Doyle, Justice

CERTIFICATE OF COMPLIANCE

This application for further appellate review complies with the rules of court, including those specified in 27.1 of the Massachusetts Rules of Appellate Procedure. It complies with the type-volume limitation of Rule 27.1(b) because it contains 1,782 words, excluding portions of the application exempted by the rule. It complies with the type-style requirements of Rule 27.1 because it has been prepared in proportionally-spaced typeface using Microsoft Word in 14 point Athelas font.

/s/ Matthew Spurlock

Matthew Spurlock

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September 9, 2022

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(e), I hereby certify that on September 9, 2022, I have made service of this application for Further Appellate Review upon the attorney of record for the Commonwealth by Electronic Filing System on:

Catherine Semel
Essex County District Attorney's Office
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Salem, MA 01970

/s/ Matthew Spurlock
Matthew Spurlock

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September 9, 2022